In The

Supreme Court of the United States

October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION,
Paul Langdon, M. Steven Boley,
Virginia Prentice, Marilyn Redden,
and William Moss, its individual Members,
and Dr. Joseph L. Davis, Superintendent
of the Columbus Public Schools,

Petitioners,

vs.

GARY L. PENICK, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EARL F. MORRIS
SAMUEL H. PORTER
CURTIS A. LOVELAND
WILLIAM J. KELLY, JR.

PORTER, WRIGHT, MORRIS & ARTHUR
37 West Broad Street
Columbus, Ohio 43215
Telephone: (614) 227-2000

Attorneys for Petitioners

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gary L. Penick, et al.,
Plaintiffs,
v.
Columbus Board of Education, et al.,
Defendants.

Civil Action
No. C-2-73-248
(Filed March 8, 1977)

OPINION AND ORDER

DUNCAN, District Judge. This matter is before the Court following trial on the issue of liability. The Court sets forth hereinbelow its findings of fact and conclusions of law, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

A. OPENING STATEMENT

The Court has listened to and then carefully examined the evidence in this most important case. After having considered the evidence and applied what I understand to be the law of the United States, I conclude that plaintiffs are entitled to judgment. It is the duty of the Court to set forth the reasons for arriving at that conclusion. In doing so, it is of the utmost importance that all concerned citizens are able to understand this decision clearly. I am well aware that many people are unfamiliar with and distressed by the law of the land which requires that school desegregation decisions, involving the education of our precious children, must often

be made by a single judge rather than other governmental officials or the voters. Moreover, the language that the Court and lawyers traditionally use to communicate the reasons for our decisions is often unfamiliar and mysterious to those not trained in the law. In the writing that follows, the Court will strive to avoid language that may not be clear to all who choose to read this decision.

On the other hand, the Court cannot evade its responsibility to counsel in this case who have worked long, hard and sincerely in behalf of their clients. The legal authorities and precedents upon which the Court relies must be communicated to the lawyers. To facilitate a reading and understanding of this opinion, the Court has prepared an appendix containing a glossary of terms and a few maps.

The pages that follow contain a discussion of the evidence presented during the trial of this case, and an application of the law of the United States to that evidence. The Court will endeavor to describe the posture of the Columbus public schools at time of trial, and to examine how it came about. The complexity and the sheer volume of the evidence presented in this case have delayed this opinion long past the point at which the Court would have preferred to have rendered a decision. This delay in reaching a decision should not be construed to reflect a hesitancy on the part of the Court in determining the basic result required by the evidence and the law. I am firmly convinced that the evidence clearly and convincingly weighs in favor of the plaintiffs.

Since 1954, when the United States Supreme Court decided the now famous case *Brown* v. *Board of Education* (*"Brown I"*), 347 U.S. 483, our citizens, parents, children, school officials, other local public officials, congressmen, presidents of the United States, and judges have to some degree or other grappled with the effect that this case and those cases that follow it have had upon a system of education that has been a significant contributor to the enormous progress of this nation.

Cases have arisen in the South and now the North, in rural as well as urban school districts, in Cincinnati, Cleveland, Dayton and now Columbus. A school desegregation problem is one we could all do better without, but there is no denying that it is just that – a problem for our community – a problem that simply won't go away if left alone. Although I have mentioned such problems in other areas of the country and Ohio, this case is unique; there are some identifiable similarities, but there are also marked differences. This fact is mentioned only to relate that this decision is based on those facts brought out in this trial and no others.

As mentioned above, I am sure there are those who earnestly believe that matters such as this should not be the subject of court decisions. Plaintiffs have claimed that they and the class of persons whom they represent have been denied the equal protection of the laws by defendants – thus, a constitutional issue is presented to the Court. Counsel for the Columbus defendants and for the State of Ohio defendants do not dispute the Court's jurisdiction. However, as I view it, the real reason that courts are in the school desegregation business is the failure of other governmental entities to confront and produce answers to the many problems in this area pursuant to the law of the United States. This Court is quick to admit that the litigation model is not the most efficient way to solve problems of far-reaching social impact, but our courts must always protect the constitutional rights of all our citizens.

Therefore, this Court in this case has done its best to find the facts and make reasonable conclusions. If my conclusions are in error, the error will be easy for those who review to discern. It is my duty as a judge of this Court to follow the law – and likewise it now is the duty of the citizens of this community to follow this decision so long as it is the law.

B. Procedural History of this Case

The Court has jurisdiction of the issues pursuant to 28 U.S.C. §§ 1331(a) and 1343(3) and (4). The civil rights claimed to have been violated are those secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties at the trial of this case are as follows and will be so identified in these findings and conclusions:

Intervening Plaintiffs. The intervening plaintiffs are 11 students attending schools in the Columbus Public Schools and their parents, representing a class of persons similarly situated. This plaintiff group was permitted to intervene in March, 1975. It is represented by counsel associated with the national office of the National Association for the Advancement of Colored People, one of whom was designated as lead counsel for all plaintiffs by order of the Court. The intervening plaintiffs are sometimes also referred to herein as the "intervenors" or the "plaintiffs."

Original Plaintiffs. The original plaintiffs are 14 students in the Columbus Public Schools and their parents, representing a class of persons similarly situated. This action was originally filed on behalf of these students and parents. Following the intervention and the designation of lead counsel, the original plaintiffs and their counsel presented evidence at trial on certain issues that they believed were not included within the case presented by the intervening plaintiffs.

Columbus Defendants. The Columbus Board of Education, its seven elected members, and Dr. John Ellis, Superintendent of the Columbus Public Schools, are collectively referred to herein as the Columbus defendants.

State Defendants. The State Board of Education, State Superintendent of Public Instruction Dr. Martin Essex, Governor James A. Rhodes, and Attorney General William J. Brown are also named defendants. For ease of reference the "State defendants" will refer to all four of these defendants.

The case was filed on June 21, 1973, by Gary L. Penick and 13 other named children (or their parents) who are students in the Columbus school system. These plaintiffs claimed that 89.5 million dollars earmarked for school construction had to be expended in such a manner as to require the Columbus defendants to carry out affirmative action to guarantee integrated educational experiences. Looking to the Board's resolutions germane to the bond issue from which the construction funds were generated, plaintiffs alleged that those resolutions, the United States Constitution, and a claimed Board reluctance to abide the requirements of its resolutions in their construction planning processes entitled plaintiffs to declaratory and other equitable relief.

On October 9, 1973, the original plaintiffs moved for a preliminary injunction to stop the construction program. The motion was heard by Judge Carl B. Rubin of this Court on April 15 and 17, 1974. At the time of the hearing, only the original plaintiffs and the Columbus defendants were parties, the Court having previously dismissed the State defendants upon the plaintiffs' own motion. After presenting evidence but before resting, the plaintiffs moved to withdraw their motion and sought leave to file an amended complaint. The Court permitted the withdrawal and amendment.

The original plaintiffs filed their amended complaint on July 19, 1974, renaming the State defendants and adding the Franklin County Recorder as a defendant. A second amended complaint was filed on October 22, 1974.

The second amended complaint was styled as a class action. It alleged that the Columbus defendants had intentionally segregated the public schools by creating and maintaining a neighborhood school policy notwithstanding a segregated housing pattern in the city. The new school construction program was claimed to further segregation. The original plaintiffs also claimed that the Columbus defendants had segregated the schools by using optional attendance areas, by segregating

teachers and principals, by failing to desegregate, and by conspiring with the County Recorder to violate the Fair Housing Law of 1968. The State defendants were alleged to be liable for failing to bring about the desegregation of the Columbus schools. The plaintiffs sought an order requiring desegregation of the Columbus Public Schools.

The motion to intervene was filed on February 5, 1975, by NAACP lawyers on behalf of 11 students in the Columbus Public Schools. The applicants for intervention sought permission to file their complaint in intervention, to have the case certified as a class action, and to have them designated as representatives of the class. The complaint in intervention named the Columbus and State defendants, as well as the Franklin County Recorder, who was subsequently dismissed. The complaint in intervention was essentially the same as the second amended complaint. The intervening plaintiffs sought an order requiring the defendants to develop and implement a "system-wide" plan of desegregation.

Although the intervenors sought to represent the same class as the original plaintiffs, the Court granted intervention under Rule 24 of the Federal Rules of Civil Procedure on March 10, 1975. Following a status conference with all counsel, the Court designated one of the attorneys for the intervenors as lead counsel for all plaintiffs.

The trial commenced on April 19, 1976, and was completed on June 17, 1976, after 36 trial days. The record is extensive. Over 70 witnesses were heard and over 600 exhibits were admitted. The trial transcript is in excess of 6600 pages. The Court heard the closing arguments of counsel on September 3, 1976.

II. PRE-1954 HISTORY OF THE COLUMBUS PUBLIC SCHOOLS

As a necessary starting point, a backward look at the Columbus school district from May 17, 1954, when the Supreme Court of the United States decided the case *Brown* v. *Board of Education* (*"Brown I"*), 347 U.S. 483, is required. It is essential that one know the 1954 racial picture of the system – whether it was unitary (no unlawful racial segregation) or dual (unlawful racial separation), and how it became what it was.

This visit with the history of the system is neither for the purpose of dragging out skeletons of the past nor a vindictive finger-pointing exercise. In many respects litigation in court is a matter of hindsight. Perhaps given the present requirements of law, some public officials might have pursued their duties differently – perhaps others would not have. However, this look to the past must be made to discover whether past acts or omissions are in any degree responsible for the admitted current racial imbalance in the Columbus schools.

Prior to 1871, the evidence indicates not only a complete separation of the faces in the Columbus school system, but also repeated demands by black citizens for adequate schools for black children.[1]

In 1871 the Supreme Court of Ohio decided the case *The State ex rel. Garnes* v. *McCann*, 21 Ohio St. 198. In that case, a black parent challenged an Ohio statute which "authorized and required" all the boards of education in the state "to establish, within their respective jurisdictions, one or more separate schools for colored children, when the whole number, by enumeration, exceeds twenty . . . ." The statute is quoted in the Supreme Court's opinion, 21 Ohio St. at 206. Recognizing

[1] See, *e.g.*, *Early Black History in the Columbus Public Schools*, by Myron T. Seifert, historian for the Columbus Public Schools, admitted at trial as plaintiffs' exhibit 351.

that blacks in the post-Civil War era were entitled to protection under the Fourteenth Amendment to the United States Constitution, the Supreme Court of Ohio nevertheless held that the statute providing for separate schools for black children affronted neither the United States nor the Ohio Constitution. Thereafter, in 1878, the General Assembly of Ohio enacted House Bill No. 105, 75 Ohio L. 513, which provided that "where in their judgment it may be for the advantage of the district to do so, [local boards of education] may organize separate schools for colored children . . . ." This statute in turn was repealed in 1887, 84 Ohio L. 34. In passing on the state of the law effective in 1888, the Supreme Court of Ohio held that Boards of Education could not maintain separate schools for black and white students. *Board of Education* v. *The State*, 45 Ohio St. 555 (1888).

It was 1878 before the first black person graduated from high school in Columbus. In that year all black children attended Loving School at the corner of Long and Third Streets, many passing closer white schools en route. In 1879 a very few blacks attended Second Avenue, Douglas and East Friend schools. However, with only these few exceptions, blacks attended Loving School.

In 1881 by resolution the Columbus Board abolished separate schools for black children. Children were assigned to attend school in districts where they dwelt. Miss Celia Davis, a black woman, taught at the racially mixed Medary school in 1897. Several other blacks taught in mixed schools during the period 1900-1907.

The Columbus Board of Education caused the Champion Avenue School to be built in 1909. The school, located in a predominantly black residential district, was staffed with all black teachers. In August, 1909, Charles W. Smith, a black parent, sued the Columbus Board of Education in the Common Pleas Court of Franklin County, alleging that the Board's action establishing Champion as a black school was illegal

under Ohio law. The Court of Common Pleas heard evidence, and on March 11, 1911, dismissed the case. Mr. Smith appealed the dismissal, and on December 31, 1912, the Circuit Court of Franklin County in Case No. 3094 affirmed the trial court's action. On January 6, 1913, Dr. William O. Thompson, one of the members of the Columbus Board of Education, reported to the Board that the Circuit Court had "affirmed the opinion of Judge Rogers, and further held that the creation of a school district is a matter of the discretion of the Board of Education, and not a subject for judicial determination, and dismissed the appeal." Apparently the trend earlier established toward integration then halted in Columbus.

During the 1920's and early 1930's Champion remained a school populated by black students with predominantly black faculty, and a black principal. Although some secondary and elementary schools were attended by both races, all of the black teachers employed in the system were at Champion.

In 1938 Pilgrim Junior High, which had been a racially mixed school, was converted to an elementary school. Champion's then all-black elementary faculty was transferred to Pilgrim, and Champion became a junior high school with a black faculty and black students. The school attendance areas were gerrymandered so that white students who lived very near Pilgrim School were permitted to attend Fair Avenue School, which was considerably more distant from their houses on Greenway and Taylor Avenues. White children who lived on those streets had attended Pilgrim before it was converted to an elementary school for black children.

In 1941 all black teachers in the system were employed at Mt. Vernon, Garfield, Pilgrim or Champion Schools, all predominantly black schools. By 1943 five schools were attended almost exclusively by black children, and the faculties of each were composed entirely of black teachers. In September of that year the entire professional staff of Felton School, composed of 13 teachers and a principal, was removed and re-

placed with 14 black persons. The same kind of 100% white to 100% black faculty transfer had occurred at the Mt. Vernon and Garfield schools in prior years. In September, 1943, the Vanguard League, a civil rights organization, complained to the Columbus Board about gerrymandering as follows:

> A more striking example of such gerry-mandering is Taylor and Woodland Avenues between Long Street and Greenway. Here we find the school districts skipping about as capriciously as a young child at play. The west side of Taylor Avenue (colored residents) is in Pilgrim elementary district and Champion for Junior High. The east side of Taylor (white families) is in Fair Avenue elementary district and Franklin for Junior High.
>
> Both sides of Woodland Avenue between Long and Greenway are occupied by white families and are, therefore, in the Fair Avenue-Franklin district. Both sides of this same street between 340 and 500 are occupied by colored families and are in the Pilgrim-Champion, or "colored" school, district. White families occupy the residences between 500 and 940, and, as would be expected, the "white" school district of Shepard-Franklin applies.

When *Brown I* was decided in 1954, there were no black high school principals in Columbus. All black administrators were assigned to predominantly black schools. There were no white principals in predominantly black schools. Under the policy and practice of the Columbus defendants' predecessors, black student teachers were required to do their student teaching at predominantly black schools.

Giving full recognition to substantial racial mixing of both students and faculty in some schools, the Columbus school system cannot reasonably be said to have been a racially neutral system on May 17, 1954. The then-existing racial separation was the direct result of cognitive acts or omissions of those school board members and administrators who had

originally intentionally caused and later perpetuated the racial isolation, in the east area of the district, of black children and faculty at Champion, Mt. Vernon, Garfield, Felton and Pilgrim. Thus, the Columbus Board of Education maintained what amounted to an enclave of separate, black schools on the near-east side of Columbus, thereby depriving hundreds of black children an opportunity for an integrated educational experience. Defendants do not appear to assert that these results were an accommodation to the neighborhood school concept.

In the Court's view, in 1954 the Columbus defendants' predecessors had caused some black children to be educated in schools that were predominantly white; however, the Board also deliberately caused at least five schools to be overwhelmingly black schools, while drawing some attendance zones to allow white students to avoid these black schools. This separateness cannot be said to have been the result of racially neutral official acts. As a result, in 1954 there was not a unitary school system in Columbus.

Over 20 years passed between the decision in *Brown I* and the filing of the second amended complaint in this case. It is necessary now to examine the actions and omissions of the Columbus Board of Education during these decades.

III. POST-1954 HISTORY OF THE COLUMBUS PUBLIC SCHOOLS

A. An Overview

I agree with the Columbus defendants that "it would be impossible to properly consider the record without beginning with a review of the tremendous growth that has characterized the entire community of Columbus, Ohio, and the Columbus Public School System in particular, over the past 25 years." From 1950 to 1960 the population of Columbus increased by 95,000 persons while the city more than doubled its land area; in the 1960's, with an aggressive annexation policy, the popu-

lation increased by over 68,000 persons. The following table illustrates the population growth since 1940:

Columbus, Ohio
Population
1940-1970

Census Year	Total Population	Increase Since Prior Census	Increase Since Prior Census
1940	303,087	15,523	5.3%
1950	375,901	69,814	22.8%
1960	471,316	95,414	25.4%
1970	539,677	68,361	14.5%

Columbus grew from about 40 square miles in 1950 to over 173 square miles in 1975 as a result of 466 separate annexations. Concomitant with the increase in population and land area was a marked rise in the population of the Columbus Public Schools. The enrollment increased from 46,352 in 1950-51 to 83,631 in 1960-61. The growth continued in the 1960's, reaching over 110,000 by the end of the decade. After attaining a high of 110,725, the total declined to 95,998 in 1975-76. Obviously the rapid growth demanded new school facilities and placed pressures upon the school officials seeking to provide quality school facilities for the expanding enrollments in a continually enlarging geographical area.

A closer view of the nature of the population growth shows the dramatic increase of black Columbus residents. In 1940, 11.7% of the population was black. During the next 30 years, the black population almost tripled; in 1970, 18.5% of the total population was black. This growth was reflected in the composition of the public school population. In 1970, 29% of the enrollment was black, as compared to the city's overall 18.5% black population.

It is clearly apparent to the Court that there is residential segregation in Columbus. On this point, plaintiffs and the Columbus defendants are in agreement. In 1970, 71% of all blacks lived within 23 contiguous census tracts. Although census base maps received in evidence at trial give some aid in the identification of the racial composition of particular census tracts, one cannot view them as accurately descriptive of the racial characteristics of any tract in any years intervening the compilation of census data. This is particularly so in those cases where maps were color-coded reflecting racial composition without reference to the density of the total population. There are instances of large color-coded areas where few people live. For example, the Columbus State Hospital's assigned color code is of graphic significance but concerns an area of low population density.

The census base maps, however, do provide a reasonable basis for my finding that from 1950 through 1970, the heaviest concentration of black residents of Columbus has been in contiguous areas which have spread from the central area of the city to the east, northeast, and to a lesser degree to the southeast.

It is true that the Columbus Board of Education had to be seriously concerned not only with accommodating the increase in the numbers of children to be educated, but also with upgrading and expanding its educational program. Improvements and programs, such as reduced class size, library learning centers, and special and vocational education, all reduced school capacity or required entirely new facilities. Actually, in 1949 the Columbus school plant was inadequate even for the 44,531 students then enrolled.

In 1950, pursuant to a request of the then Columbus school superintendent, the Bureau of Educational Research at The Ohio State University began a comprehensive, scientific and objective analysis of the school plant needs of the school system. The Bureau studied and reported on community growth char-

acteristics, educational programs, enrollment projections, the system's plan of organization, the existing plant, and the financial ability of the community to pay for new school facilities. Thereafter, a number of general and specific recommendations were made to the Columbus Board by the Bureau. The recommendations included the size and location of new school sites as well as additions to existing sites. The recommendations were conceived to accommodate the so-called "community or neighborhood school concept." The 1950 concept was related to a distance criteria grounded on walking distance to schools as follows: ¾ mile for elementary, 1½ miles for junior high and 2 miles for senior high students.

The Board of Education adopted and relied upon the Bureau's recommendations in proposing and encouraging the passage of bond issues in 1951, 1953, 1956, 1959 and 1964. School construction of new facilities and additions to existing structures were accomplished in substantial conformity with the Bureau's periodic studies and recommendations.

The rapid growth of Columbus also demanded a larger professional staff to serve the city's schools. The numbers of black professionals employed by the Columbus Board has increased since 1969 from 632 or 11.8% of the total number of 5,349, to a 1975 high of 926 or 17.5% of a total 5,298.

In 1951 a cadet principal program was begun. In 1972 27 persons were selected as cadet principals; 13 of them were black. Since 1969, 44 of the 100 cadet appointments have been black teachers. In the last five years the number of black administrators assigned has increased from 44 to 69, a 56.8% increase during that time. However, in 1954 there still were no black high school principals in Columbus, and by 1956 there still were no black administrators in any but the black schools, and no white principals in the black schools. Although the number of black administrators at majority white schools increased from only four in 1971 to fourteen in 1975, the number remains proportionately low.

Between 1964 and 1973 the Columbus defendants generally maintained their prior practice of assigning black teachers to those schools with substantial black student populations. As an example, as late as the 1972-73 school year, there were 250 black elementary teachers assigned to schools in which the student body was 80-100% black, which represented 63.3% of all of the black elementary teachers in the system. In the same school year, 34 elementary schools, all of which contained 80-100% white student bodies, had no black teachers assigned to them.

In July, 1974 the Columbus defendants consummated a conciliation agreement with the Ohio Civil Rights Commission after a complaint had been filed by the Columbus Area Civil Rights Council alleging faculty racial segregation. The agreement included the following language:

> The Plan will also insure that the experienced teachers and teachers with advance training and degrees shall be reasonably distributed throughout the school system.
>
> . . .
>
> To the degree possible, the goals established in this plan shall be accomplished by September 1973 through a process of *voluntary transfers* and *selective assignments* of new professional staff members. Such a process shall be supplemented by *required assignments* of present professional staff members, as needed, . . . (Emphasis added.)

Of special note here is Section 5 of the plan which read:

> The assignment and transfer of professional members to and from schools *where the average training and experience of professional staff members is significantly below the system average* shall be made so that this differential is reduced or as a minimum not significantly increased. (Emphasis added.)

It is true, as plaintiffs claim, that the Columbus defendants were not at the time of trial 100% in conformity with the agree-

ment. The Court believes that the failure to completely comply with the strict letter of the requirements of the agreement does not represent a substantial factual matter helpful in the resolution of the issues in this case.

In 1965 the Columbus Board created the Council on Intercultural Education to obtain advice and suggestions on racial matters involving the schools. In August, 1966 the local chapter of the NAACP presented a position paper to the Council protesting that unconstitutional school segregation was abroad in the Columbus schools and suggesting procedures for desegregation. In May, 1967 the Columbus Urban League called for the integration of the school system and suggested how it could be accomplished. The Columbus Board in 1967 officially adopted a policy to take racial balance into consideration in drawing attendance zones. In addition the Columbus Board adopted a voluntary transfer program to improve racial balances. Under the plan as adopted, students were eligible to transfer schools if the transfer resulted in better racial distribution at each school; no transportation was provided. This plan existed for six years, and had little integrative impact on the school system.

In 1969 the voters defeated a $75,950,000 school bond issue. In 1971 a representative committee was formed under the name Project UNITE to study the needs of the school system. A sub-committee of that group identified specific facility needs and made recommendations to the Board of Education. A November 1972 bond issue was approved by the voters. Included in the promised proposed construction program was a commitment to giving each student the opportunity for integrated educational experiences through the use of new special, magnet-type developmental learning centers, district-wide career centers, special programs to attract students from other schools, and a commitment to locate new buildings whenever possible to favor integration without resorting to unreasonable gerrymandering. But see the discussion concerning

the Innis Road and Cassady Elementary schools in Part B of this section.

Perhaps best descriptive of the philosophy of the Columbus Board is its July 18, 1972, officially-adopted formal goal statement on integrated education:

> It shall be the goal and the policy of the Columbus Public Schools to prepare every student for life in an integrated society by giving each student the opportunity of integrated educational experiences. Such a goal does not imply the mandatory or forced transportation of students to achieve a racial balance in any or all schools. The Superintendent of Schools shall implement this policy by the development of proposals for the approval of the Board of Education. The first priority of the Superintendent shall be the development of a plan to provide the transportation necessary to give all students access to vocational and career faci'ities and all special programs or courses offered by the Columbus Public Schools.

In late November, 1972 the Columbus Board voted down a resolution which would have established a site selection advisory committee to assist the Board in preventing new schools from being built on sites which would result in racially identifiable new schools. Likewise, on May 1, 1973, the Columbus Board rejected a motion that it seek the assistance of the State Department of Education in obtaining financial and technical assistance to desegregate the schools. By vote this Board also decided not to request federal funds with which to desegregate. On September 3, 1974, the Board passed a resolution providing that the Superintendent devise a more effective means of making available more integrated educational opportunities by September 1, 1975.

In April, 1973 the Columbus Board formally adopted the "Columbus Plan." The first version provided for four types of student transfers: racial balance, vocational program, educational program, and occupational program. Only since

1975 has the Board provided transportation for the full-day racial balance transfers. In the 1975-76 school year, 3,612 students participated in Columbus Plan transfers; of these, 584 full-day transfers were for racial balance. Even more voluntary participation was expected in 1976-77.

In the school year 1975-76 four alternative or magnet schools were in operation. Two more will be open in 1976-77. Four new career centers, which hopefully will have an integrative effect, will be fully operational by 1977, involving about 4,000 students. Integrated study trips, all-city activity and exchange activity all have been engaged in and encouraged in an effort to provide positive integrated experiences.

Nevertheless during the 1975-76 school year, when this case was tried, 70.4% of all the students in the Columbus Public Schools attended schools which were 80-100% populated by either black or white students; 73.3% of the black administrators were assigned to schools with 70-100% black student bodies; and 95.7% of the 92 schools which were 80-100% white had no black administrators assigned to them.

B. Specific Actions—Post-1954

In deciding the issues of the case, a close review of the racial composition over the years of the Columbus School system is helpful. Since the Department of Health, Education and Welfare began to require that racial statistics be submitted, a rather accurate appraisal of the racial character of the schools can be made. For those years when no such data were kept, the numbers of students of one race or another cannot accurately be determined; however, a hindsight review of other social statistics provides a basis to make reasonable inferences as to the probable racial composition of the schools for those years.

In making the analysis that follows, the Court has not forgotten the truism that the mere presence of racial imbalance

in the make-up of school student bodies, without more, will not permit a finding of unconstitutional segregation.

To analyze the mass of statistical evidence received at trial, it is necessary for the Court to establish a frame of reference. Plaintiffs' expert witness, Dr. Gordon Foster, used statistical criteria in terming a school "racially identifiable." Using actual or estimated racial statistics concerning the black student enrollment in the total Columbus school system, he applied a statistical variance formula (plus or minus a specific percentage point range, chosen by reference to the relative size of the overall black student enrollment in a given time period) to the system-wide average to establish a rough yardstick for determining whether the percentage of black student enrollment in particular schools was within the general range of the system-wide average. See the definition of "racially identifiable" in the glossary in the appendix to this opinion. For the period of 1950 to 1957, he estimated the black student enrollment to be approximately 15% of the total enrollment. Because of the small percentage of blacks in the system as a whole, the measure of racial identifiability he adopted was plus or minus 5%. In 1957, he used an estimate of 20% non-white population and a range of plus or minus 10%. In 1964, he used an estimate of 25% non-white and 26.6% non-white at the secondary level and a range of plus or minus 15%. In 1975, he used the actual racial percentage of 32.5% non-white and a plus or minus 15% range. Dr. Foster testified that whenever there was a close situation, he called the school racially unidentifiable. The Court notes the necessity for using the smaller range when the percentage of black pupils was at a low level in the system. Similar ranges have been used by some courts as a rough gauge for measuring the racial identifiability of schools. There is ample evidence to support the use of such ranges and the evidence indicates that Dr. Foster's estimates are reasonable.

Based upon the law as it is set out in Part IV of this opinion, I am constrained, from certain facts which I believe to be

proved, to draw the inference of segregative intent from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance.[2] And although defendants have contended that the Columbus Board of Education's actions since 1954 have been racially neutral, the plaintiffs' proofs included a number of Board actions which cannot reasonably be explained without reference to racial concerns.

School Construction

The area of site selection for school construction is a particularly difficult subject. Looking with hindsight on what was done, we must not only consider the effect of the Columbus defendants' site selection decisions, but also ask what other steps could or should have been taken. Many factors must be considered in making site selections for new schools, including acquisition and construction costs, the present demography and projected development, the availability of services, accessibility, and public relations. It is rarely possible to isolate and identify any particular factors which were ultimately determinative in the selection of a site. The evidence does show that all of these factors were considered when the need for new school facilities arose and a site was selected. The evidence also shows that in many cases alternative site selections were suggested. Many of the probable consequences of particular alternatives were predictable and known to the Columbus defendants.

[2] Evidence was introduced in attempt to prove or disprove racial preferences in student transfers, assignment of non-teaching and non-administrative employees, assignment of students and substitute teachers and special education programs. The plaintiffs' proofs regarding these matters do not bear sufficient impact to be helpful in the resolution of the issues.

It is noted that the assignment of non-professional staff is racially suspect; however, the Court does not find sufficient nexus between that fact and the issues being litigated, and it is not a part of the factual setting from which the Court draws conclusions against defendants.

The Columbus defendants have contended throughout that they have followed a neutral neighborhood school policy. In keeping with that policy, schools have generally been built in locations where the expanding and growing population demanded additional facilities. Of 103 schools constructed between 1950 and 1975, 87 opened with a racially identifiable student body according to the calculations of Dr. Foster. Of the 87 schools, three have been closed. These schools closed with racially identifiable student populations. Seventy-one of the 87 new schools remained racially identifiable at the time of trial.

It is necessary for the Court to consider those foreseeable effects of the construction practice which promote or preserve a segregated school system. It is apparent to the Court, and presumably to the defendants, that schools which open with a racially identifiable student body tend to stay that way. The Court finds that in some instances initial site selection and boundary changes present integrative opportunities.

The evidence supports a finding that the Columbus defendants could have reasonably foreseen the probable racial composition of schools to be constructed on a given site. In some instances the Columbus defendants had actual knowledge of the likelihood that some schools would open and remain racially identifiable if built on the proposed sites. One such case was Gladstone Elementary School. See map 1 in the appendix to this opinion. Although Gladstone was apparently opened in 1965, the first statistics available concerning its racial composition concern the year 1966, when it had a student population which was 78% black. Gladstone's black enrollment has been in excess of 90% since 1967. Mr. Lumpkin, who later became the president of the Gladstone Parent Teacher Association, testified that prior to its construction he communicated to the Board of Education that Galdstone would predictably open as a predominantly black school. The 1960 census map shows that in that year the area in which Glad-

stone was eventually built was predominantly white. The 1970 census map indicates that this same area was predominantly black. This reflects the definite trend of an expanding black population northward into this area in the 1930's. This trend was fairly well advanced in 1966, given Gladstone Elementary's 78% black enrollment that year.

Gladstone was built between Hamilton Elementary and Duxberry Park Elementary with the greater portion of the Gladstone attendance zone being drawn from the southwestern portion of the former Duxberry zone. This section of Duxberry had a higher black density than did the northern and eastern sections. Thus, the black student popu'ation in Duxberry dropped from 40% in 1965 to 33% in 1966. Linden Elementary, to the north of Hudson Street, remained virtually 100% white throughout the middle 1960's. The construction of Gladstone south of Hamilton and Duxberry served to contain the black student population in the area south of Hudson Street.

The need for greater school capacity in the general Duxberry area would have been logically accommodated by the construction of Gladstone north of its present location, nearer to Hudson Street. This would, of course, require some redrawing of boundary lines in order to accommodate the need for class space in Hamilton and Duxberry. If, however, the boundary lines had been drawn on a north-south pattern rather than an east-west pattern, as some suggested, the result would have been an integrative effect on Hamilton, Duxberry and the newly-constructed school.

The Court also finds that the site selection and attendance zone boundaries for Sixth Avenue Elementary resulted in a foreseeably blacker school. Sixth Avenue opened as a primary center (grades K-3) in 1961 and closed in 1973. During this entire period, Sixth Avenue was racially identifiable with a black student population of at least 85%.

The Sixth Avenue school was built in accordance with a recommendation contained in the 1958-59 study of the Public

School Building Needs of Columbus, Ohio. Recommendation number 11 on page 58 of that document describes an area bounded by High Street on the west, Chittenden Avenue on the north, New York Central Railroad on the east, and Fifth Avenue on the south. Sixth Avenue elementary was built on the proposed site. The attendance zone for Sixth Avenue was as recommended, except that Fourth Street was its western boundary. This area can generally be described as the eastern portion of the Weinland Park Elementary attendance zone and the northeastern corner of the Second Avenue Elementary attendance zone. Both the 1960 and 1970 census maps (and the underlying statistical data) show that these portions of the former Weinland Park and Second Avenue Elementary attendance zones had the highest percentage of black residents within the area. The census data shows that the population west of Fourth Street was largely 0 to 27.9% black with two or three blocks being in the 28 to 49.9% range. The east side of Fourth Street is generally in the 50 to 89.9% black range, with several blocks in the 90 to 100% black category. The Sixth Avenue attendance zone consists almost entirely of 50 to 100% black population. The black population in the area left within the attendance zones of Weinland and Second after Sixth opened is generally below 27.9%, with a few blocks in the 28% to 49.9% range.

In 1964, three years after Sixth Avenue opened and the first year for which racial statistics are available, Sixth Avenue had a black student enrollment of 91%. In that year Weinland Park and Second Avenue had black student populations of 30% and 28%, respectively. The boundary lines for these schools remained relatively unchanged until 1973, when Sixth Avenue closed. Sixth Avenue closed with a black enrollment of 94.6%. In that year Weinland Park and Second had black enrollments of 30.5% and 16.7%, respectively. In the 1974-75 school year following the closing of Sixth Avenue, the boundary lines for Weinland and Second were redrawn to resemble the 1960 attendance zones. With the closing of Sixth the black

population of Weinland rose from 30.5% to 46.7% while Second Avenue rose from 16.7% to 20.7%. The Court finds that the construction site and attendance zone drawn for Sixth Avenue Elementary between 1961 and 1973 resulted in Sixth Avenue being the black school in the area while making Weinland Park and Second Avenue whiter.

The impact of building a new elementary school at the Sixth Avenue location and drawing the attendance zone boundaries where they were drawn was clearly foreseeable to the Columbus defendants. Some students living in the area east of Fourth Avenue, shown to be predominantly black on both the 1960 and 1970 census maps, were compelled to walk to Sixth even though Weinland Park was closer to their homes. Even if the Court were to find compelling non-segregative reasons for the construction of this new school on its Sixth Avenue site, it is readily obvious from the census maps that the objectives of racial integration would have been better served, without abandoning the neighborhood school policy, by drawing the attendance zones east and west between High Street and the railroad tracks, rather than north and south along Fourth Street. The Columbus defendants have offered no explanation for the fashion in which Sixth Avenue was opened and maintained during this period.

The Court is well aware of the Board's obligation to provide class space as the need arises, whether it be in an area of expanding geographic growth, or within the inner-city area due to increasing population or the closing of obsolete structures. Given segregated residential patterns, not all schools can be built in an integrated setting. In such circumstances the selection of sites for new schools alone may not serve as a tool for integration. The intervening plaintiffs argue that the construction of a school in an area known to have been covered by racially restrictive covenants and subject to discriminatory real estate practices constitutes an impermissible participation by the school officials in racial discrimination.

The Court does not infer segregative intent from the mere construction of schools in an area needing the facilities even though that area had been covered by racial covenants. Without the use of pairings, transportation, or other techniques, the racial imbalance in these schools could not have been cured by the siting of schools even had the Columbus defendants devoted their attention to the racial integration of the schools.

The opportunity for active integration did exist, however, without the use of transportation, in some parts of the city. Even greater integration could have been achieved with the use of pairings and limited transportation. This opportunity existed, and continues to exist in those areas of the city where the population shifts from one race to another. An examination of the census maps for the years 1950, 1960 and 1970 discloses a general pattern of high density (50 to 100%) black population in the center of the city fringed by areas of lesser, but still substantial, (10 to 50%) black population. The remainder of the city is predominantly white, although there are pockets of white population within the central city area, and pockets of black population in the outlying areas.

The Columbus defendants argue that housing in the City of Columbus is segregated as a result of private discrimination and other factors affecting residential development over which the school board has no control and little influence. The Columbus defendants maintain that they have adopted a racially neutral neighborhood school policy. They contend that the use of a neighborhood school policy in a city with segregated housing patterns results, through no fault of the school authorities, in racially imbalanced schools. Under the neighborhood school policy, the site selected for a new school limits the attendance zone boundaries that can be drawn for that school. The evidence shows that in some instances the need for school facilities could have been met in a manner having an integrative rather than a segregative effect.

The Near-Bexley Option

East of the downtown area of Columbus, and entirely surrounded by the Columbus city limits, lies the City of Bexley, Ohio. East of Bexley, and also entirely surrounded by the Columbus city limits, is the City of Whitehall, Ohio. With the execption of one small area of Columbus which jumps across Alum Creek to the eastern side of the creek, the western boundary of Bexley follows the course of Alum Creek. The Columbus residential area to the west of Alum Creek was in 1960 and 1970, according to census data, heavily populated by blacks. For that area in those years, census tracts generally appear as either 50-89% black or 90-100% black. A different picture existed for the area to the east of Alum Creek, encompassing the City of Bexley and the small portion of Columbus which lies immediately east of the creek. According to census data, 99% of Bexley residents were white in 1960, and 99.3% were white in 1970. Census data further indicate that in 1960 there were 159 people residing in that area of Columbus which lies immediately east of Alum Creek; all of these people were white.

From the 1959-60 school year through the 1974-75 school year, the Columbus Board of Education established and maintained an optional attendance zone encompassing the area of Columbus which lies directly east of Alum Creek. Students living in that area were within the attendance areas of schools located to the west of Alum Creek, nearer the Columbus downtown area. This 1959-1975 option permitted these students to elect to attend Columbus city schools located to the east of the City of Bexley. For ease of reference, the Court will refer to this option as the "Near-Bexley Option."

Absent the Near-Bexley Option, students living in the optional zone area would have been required to attend Fair Avenue Elementary (opened in 1890), Franklin Junior High School (opened in 1898) and East Senior High School (opened in 1922). The following statistics are applicable to these near-east side schools:

	1964	1969	1974
Fair Avenue Elem.			
% black students	92.0	95.0	96.7
% black faculty	83.3	37.1	23.3
Franklin Jr. H.S.			
% black students	85.8	96.3	93.7
% black faculty	32.6	34.6	45.8
East Sr. H.S.			
% black students	94.9	98.9	98.9
% black faculty	12.7	28.9	31.3

The schools on the receiving end of the option were Fairmoor Elementary (opened in 1950), Eastmoor Junior High School (opened in 1962) and Johnson Park Junior High School (opened in 1958), and Eastmoor Senior High School (opened in 1955). The following statistics are applicable to these schools:

	1964	1969	1974
Fairmoor Elem.			
% black students	0.1	0.9	4.6
% black faculty	0	4.0	18.2
Eastmoor Jr. H.S.			
% black students	30.5	34.4	45.3
% black faculty	0	9.8	15.2
Johnson Park Jr. H.S.			
% black students	0.3	2.9	26.7
% black faculty	0	2.0	12.7
Eastmoor Sr. H.S.			
% black students	10.6	17.8	34.9
% black faculty	0	4.0	15.2

Eastmoor Junior High School was a receiving school for the Near-Bexley Option during the 1959-60, 1960-61, and 1963-64 through 1974-75 school years. Johnson Park was a receiving school for the option during only the 1961-62 and 1962-63 school years; there are no racial statistics available for Johnson Park Junior High School for these two years. The 1960 census data indicate that the Johnson Park attendance area was predominantly white at that time.

The Near-Bexley Option, then, concerned a small, white enclave on Columbus' predominantly black near-east side. The option area, although part of Columbus, had more in common, geographically and racially, with Bexley than with Columbus. In practical effect, the Near-Bexley Option permitted white students in the optional zone to escape attendance at black Fair Avenue Elementary, Franklin Junior and East Senior High Schools, and permitted them instead to attend white (or whiter) Fairmoor Elementary, Eastmoor Junior or Johnson Park Junior, and Eastmoor Senior High Schools. And, as an examination of maps 2, 3, and 4 in the appendix demonstrates, to exercise the option Columbus students had to traverse the City of Bexley to arrive at the option schools.

Nothing presented by the Columbus defendants at trial, at closing arguments, or in their briefs convinces the Court that the Near-Bexley Option was created or maintained for racially neutral reasons. The Court finds that the option was not created and maintained because of overcrowding or geographical barriers.

These defendants contend that the option involved only a few students. The July 10, 1972, minutes of the State Board of Education, at page 44, appear to indicate that in 1972, there were 25 public elementary school students and two public high school students residing in the optional zone. However, the fact that the option was created, and maintained by the Columbus Board of Education for some 16 school years, is of itself some evidence that the option was not merely a paper exercise.

The Court is not so concerned with the numbers of students who exercised or could have exercised this option, as it is with the light that the creation and maintenance of the option sheds upon the intent of the Columbus Board of Education. It is noteworthy that the July 10, 1972, minutes of the State Board of Education indicate awareness by the State Board that a proposed transfer of the Near-Bexley Option area to the Bexley school district "[r]aises the question of percentage of racial mix." (The proposed transfer was opposed by the Columbus Board of Education, and was denied by the State Board.) Quite frankly, the Near-Bexley Option appears to this Court to be a classic example of a segregative device designed to permit white students to escape attendance at predominantly black schools.

Highland, West Mound and West Broad Elementary Optional Zones and Boundary Changes

Another area illustrative of action by the Board promoting racially segregated schools is on the west side of Columbus. Four elementary schools are involved: Burroughs, Highland, West Broad and West Mound. The census data for the years 1950, 1960 and 1970 show an area of black population between West Broad Street and Sullivant Avenue bounded on the west by Eureka Avenue and on the east by the Columbus State Institute. This area is referred to locally as the Hilltop. The western portion of this area fell mostly in the 50% to 100% black range. The eastern portion, between Belvidere and the Columbus State Institute, was in the 0 to 9.9% black range in 1950 and has become increasingly blacker in later years. The 1970 census data shows this area to have several blocks in each of the ranges of 10 to 27.9%, 28 to 59.9% and 60 to 89.9% black.

Highland Elementary has served the majority of this area between 1950 and the present. During this period the Columbus defendants established two optional attendance zones

within the Highland boundaries, and also changed the attendance zone boundaries of Highland. Although the opportunity existed for the integration of the four elementary schools in this area, the option zones and boundary changes tended to preserve and promote the racial imbalance of these schools.

One optional zone appeared in 1955 and continued through the 1956-57 school year. See map 5 in the appendix. In those years, and since 1939, the Highland attendance zone included an area north of West Broad Street to the Pennsylvania Railroad tracks bounded on the west by Eldon Avenue and on the east by the Columbus State Hospital. This portion of Highland north of Broad Street was composed in each of the census years, 1950, 1960 and 1970 of blocks in the 0 to 9.9% black range, as was the entire West Broad attendance zone. For the school years 1955-56 and 1956-57 that portion of Highland north of Broad was made into an optional attendance area with students having the option of attending the predominantly white West Broad or the predominantly black Highland.

Highland was 63 students over capacity in 1955, and 67 students over capacity in 1956. West Broad, however, was also over capacity in 1955 and 1956 by 115 and 113 students, respectively. An examination of the attendance zones in the West Broad Street area reveals that several required students to cross this street to reach their school. The Court concludes that the Highland-West Broad optional zone was not created to alleviate overcrowding or because of a geographic barrier. This optional zone allowed the white students north of Broad Street to escape Highland and go to West Broad. The result was to contain blacks within Highland and to maintain West Broad as a predominantly white school.

In 1957 the boundary lines for Highland and West Broad were redrawn, eliminating the option zone and placing that area permanently within the West Broad attendance zone. Because West Broad's capacity problems were greater than those of Highland, a purpose of the boundary change could not

have been to alleviate the overcrowding at Highland. Since the West Broad attendance zone dipped south of Broad Street west of the Highland zone, the Court concludes that West Broad Street was not considered a geographical barrier in the decision to redraw these boundaries.

In 1964, the first year in which the racial statistics for enrollment are available, Highland had a black student enrollment of 75%. West Broad Street was 100% white in 1964. The Court finds that the optional attendance zone and boundary changes between Highland and West Broad had a foreseeable and actual effect of promoting racial imbalance.

Another optional attendance zone was created within the Highland boundaries in 1955. This optional zone was in the southeastern corner of Highland and gave the students living there the option of attending either Highland or West Mound Street. See map 5 in the appendix. This option continued through the 1960-61 school year. The census data for 1950 shows that the West Mound Street attendance zone was, with the exception of one block, within the range of 0 to 9.9% black. The remaining block was in the 10 to 27.9% black category. In 1960 the West Mound attendance area was still largely in the 0 to 9.9% black range with four blocks in the 10 to 27.9% category and one block in the 28 to 49.9% range. The option area east of Wrexham and south of Doren was in the 0 to 9.9% black range in the 1950 census. In the 1960 census the option area continued to be predominantly white with a small portion falling in the 10 to 27.9% black range.

The effect of the Highland-West Mound option was to allow those students living in the whiter portion of the Highland attendance zone to opt out of attendance at identifiably black Highland in favor of the whiter West Mound Street School. The defendants contend that this optional zone was created to alleviate overcrowding in Highland. During the option years Highland was over capacity and West Mound Street was under capacity ranging from four students below capacity in 1957 to 105 in 1960. The effect of the option on

the overcrowding at Highland was the foreseeable result that the white students within the option zone would exercise the option to attend West Mound. Thus, even though an option zone may have eased the capacity problem, this particular option zone tended to make Highland blacker and West Mound whiter. In 1961 the option was terminated and the greater part of the option area was rezoned permanently to West Mound Street.

The intervening plaintiffs have shown that feasible alternatives were available and known to the Columbus defendants. One of these alternatives was to move the option area to the west, or make the boundary changes west of where they were made. This alternative would have allowed students from the blacker part of the Highland attendance area to attend West Mound, thus having an integrative effect on West Mound while easing the overcrowding at Highland. Another alternative would require redrawing the attendance zones in this area for Highland, West Mound, West Broad, and Burroughs. Dr. Foster testified that the total capacity of these four schools was 3,060 at the time of trial and the enrollment was 2,773. The following statistics are applicable to these schools:

Burroughs	**1964**	**1969**	**1974**
% black students	16	14.6	12.5
% black faculty	0	3.1	18.5
Highland			
% black students	75	71.7	72.7
% black faculty	4.6	22.6	16.7
West Mound			
% black students	15	16,1	16.5
% black faculty	0	7.7	17.4
West Broad			
% black students	0	0.7	1.0
% black faculty	0	3.0	12.1

The racial balance at all four schools could have been enhanced by redrawing the attendance zones for these four schools through the Hilltop area. This could also be achieved by pairing. The Court finds each of these alternatives to be feasible and there has been no showing that they are unsound as a matter of academic administration. The Court concludes that the actions of the Columbus defendants had a substantial and continuing segregative impact upon these four west side schools.

Moler Elementary Discontiguous Attendance Area

In the early and mid-1960's, the Columbus Board of Education was faced with overcrowded elementary schools in the southeastern area of the Columbus school district. Stockbridge Elementary, Alum Crest Elementary, Watkins Elementary and an addition to Stockbridge Elementary were opened in the southeastern area during this period. In the 1963-64 school year, the Board of Education assigned the eastern portion of the Watkins Elementary School attendance area to Moler Elementary School. This eastern portion of the Watkins area did not abut the Moler attendance area. See map 6 in the appendix. To arrive at Moler, students living in the discontiguous atendance area were transported through the Alum Crest attendance area. This discontiguous attendance area remained in effect through the 1975-76 school year, when this case was tried.

Census data for 1960 indicate that neither the Moler attendance area proper nor its discontiguous attendance area had a significant number of black residents. The same census showed that the Alum Crest attendance area did have a significant black population. The following statistics are applicable:

	1964	1969	1974
Alum Crest Elem.			
% black students	50	77	78.7
% black faculty	33.3	40	25
Moler Elem.			
% black students	0.2	8.7	50.1
% black faculty	0	10.5	11.8

Between September, 1966 and June, 1968, about 70 students, most of them white, were bused daily past Alum Crest Elementary from the discontiguous attendance area to Moler Elementary. The then-principal of Alum Crest watched the bus drive past the Alum Crest building on its way to and from Moler. At the time, the Columbus Board of Education was leasing 11 classrooms at Alum Crest to Franklin County. There was enough classroom space at Alum Crest to accommodate the students who were transported to Moler. When the principal inquired of a Columbus school administrator why this situation existed, he was given no reasonable explanation.

The Court can discern no other explanation than a racial one for the existence of the Moler discontiguous attendance area for the period 1963 through 1969.

The Heimandale Discontiguous Attendance Area

The Fornof Elementary attendance area is in the southern part of the Columbus school district. To the east of the Fornof area, and adjacent to it, is the Heimandale Elementary attendance area. The 1950 census shows no appreciable black population in either attendance area. The 1960 census indicates that Fornof's area remained predominantly white, with all census tracts having less than 10% black residents. The Heimandale attendance area, on the other hand, reflects a

substantial black population by 1960, with most of the area between 28% and 50% black, and some tracts as high as 90-100% black. The 1970 census data for both areas are similar to the 1960 data. In 1964, the first year for which such statistics are available, Fornof had 0.2% black students, and no black faculty members. In the same year, Heimandale had 40% black students and 40% black faculty.

For six school years, from 1957-58 through 1962-63, the Columbus Board of Education perpetuated a discontiguous attendance area involving Heimandale and Fornof. Students living on three streets (Wilson, Bellview and Eagle Avenues) located near the center of the Heimandale attendance area were assigned to attend Fornof instead of Heimandale. Less than 10% of the persons living on these streets were black. There was no geographical or capacity justification for the Heimandale discontiguous attendance area. The existence of this area meant that students living on Wilson, Bellview or Eagle Avenue did not attend their neighborhod school, Heimandale, which had a significant number of black students, and did attend Fornof, which was a racially identifiable white school.

The Innis-Cassady Alternatives

In 1971, the Columbus school district absorbed the Mifflin school district. The area involved is north of the City of Bexley, between 13th Avenue and Morse Road. The Mifflin school district had been in poor financial straights; schools in the district were severely overcrowded. The Columbus Board of Education initially maintained the Mifflin district boundary as a school attendance area, but was required to assign some pupils to a nearby temporary facility while more permanent arrangements were being made.

The north-south length of the area involved is greater than the east-west breadth. Cassady Elementary School, opened as a Mifflin school in 1964, is located on Agler Road roughly

midway between 13th Avenue and Morse Road. The residential area south of Agler Road was and is predominantly black, while the area north of Agler Road was and is predominantly white. Because Cassady Elementary was so overcrowded, the first school built with funds raised under the 1972 bond issue was Innis Road Elementary School, which was intended to alleviate the overcrowding at Cassady. Innis was built to the north and west of Cassady; it opened in 1975.

The Columbus Board of Education had announced in 1972 that improved racial balance of student enrollment was a factor which was relevant in site selection and boundary drawing. In 1975, prior to the September opening of Innis Road Elementary, the administrative staff of the Columbus Public Schools presented to the Columbus Board of Education two alternative attendance proposals concerning Innis and Cassady. Dr. John Ellis, Superintendent of the Columbus Public Schools, explained at trial why two options, rather than a single recommendation, were presented to the Board:

> The basic reason was to see, as we atempt to wrestle with the very difficult issue of how can we insure we are doing everything that we can that is reasonable and appropriate and right to increase the approved integration within the Columbus School District. We are honestly attempting to achieve that end, and we looked at a couple of different alternatives in these cases to see whether or not we could come up with a better plan than — to see if there was a better approach, and as it turned out, both approaches had some problem with the standpoint of distances and transportation and crossing highways and preferences of people and a host of factors that go into the establishment of boundaries.

Dr. Ellis and Mr. Robert W. Carter, Executive Director of Administration, Columbus Public Schools, both testified at trial that in their respective opinions, the alternatives presented to the Board of Education concerning Innis and Cassady were

both educationally sound. The administrative staff did not recommend one alternative over the other.

One alternative entailed dividing the old Mifflin district into two attendance areas, with a horizontal boundary line dividing an Innis attendance area to the north from a Cassady attendance area to the south. The administrative staff and the Board of Education knew that adopting this alternative would mean that Cassady would draw its enrollment from the predominantly black southern portion of the old Mifflin district, while Innis would draw its enrollment from the predominantly white northern portion.

The other alternative entailed maintaining the old Mifflin district as the attendance area for both Cassady and Innis, with one school designated as a primary center (kindergarten through third grade) and the other as an intermediate school (grades four through six). The administrative staff and the Columbus Board of Education knew that adopting this alternative would mean that the black student enrollment in each school would be roughly equivalent to the white student enrollment.

The Columbus Board of Education chose the first alternative. It divided the old Mifflin district into two elementary attendance areas, one to the south for Cassady and one to the north for Innis. When Innis Road Elementary School opened for the 1975-76 school year, its student enrollment was 27.3% black. Cassady Elementary School during the same year had 89.3% black students.

During closing arguments, counsel for the Columbus Board of Education explained the Board's decision as follows:

> The Board based its decision on the fact that it at the time decided to maintain the K-6 organization throughout the district and that the pairing of these schools, given the geographical location of these two areas, would have required a substantial amount of transportation to effect a pairing situation.

The Columbus defendants' proposed findings of fact run in a similar vein:

> [T]he pairing of such schools would have required substantial transportation because of the large size of the combined areas. The Board voted not to pair the schools.
>
> . . . The alternative proposal would have required substantial transportation because of the greater distances involved. The Columbus Board was also justified in its decision to maintain the K-6 organization that now exists throughout the system with the exception of Colerain, which is a primary and crippled children center. Other primary centers are no longer in existence. Sixth Avenue has been closed. The K-3 primary center at Hudson, which was assigned to Hamilton, was recently eliminated with an addition. The school system has never had a K-3 primary center without a K-6 home school . . . .

These defendants' own proposed findings amply demonstrate that when in the past a diversion from the K-6 structure served interests, such as overcrowding and special educational concerns, which were considered important by the Board, the Columbus Board of Education did not hesitate to abandon the K-6 structure in favor of primary centers and intermediate schools.

The Court can find no evidence in this record supporting defendants' argument that pairing Innis and Cassady would have necessitated "substantial transportation" of students. Dr. Ellis testified that *both* alternatives "had some problem with the standpoint of distances and transportation and crossing highways . . . ."

It is truly ironic that Innis Road Elementary was the first school built with the $89.5 million raised when Columbus voters approved the November 7, 1972, bond issue. A $75.95 million bond issue had been defeated at the polls in 1969. Dr.

John Ellis became Superintendent of the Columbus Public Schools in August, 1971. In November of that year he proposed Project UNITE, which is mentioned in Part A of this section of this opinion. On December 7, 1971, the Board of Education approved a resolution authorizing the implementation of the project. After a tremendous amount of community participation in the project, including nine public forums, the steering committee of Project UNITE presented its official report to the Board of Education on May 30, 1972. Thereafter, before the November balloting, the Board approved various aspects of the Project UNITE report. The approved proposals were in turn capsulized in a document styled "THE BOND ISSUE, 1972: PROMISES MADE," which was widely distributed in the community and was the subject of news media presentations.

At the June 27, 1972 meeting of the Columbus Board of Education, Superintendent Ellis noted that Project UNITE "spoke in many ways to the fact that we should consider the question of integration as a policy for the consideration of the Board." The following resolution was moved and seconded:

> It shall be the goal of the Columbus Public Schools to make available integrated educational experiences for all students. Therefore, the Board of Education and administration shall reflect that goal in the enactment of policy and in administrative action.

Two of the three blacks on the seven-member Board spoke in favor of an amendment which would have replaced the words "to make available" with the words "to provide." Two white Board members spoke against the amendment, asserting that the "to provide" language connoted mandatory integration. The amendment was defeated on a 2-5 vote, and the original resolution passed on a 4-3 vote, the black members voting nay. Thereafter, at the same meeting, a resolution which would have placed the $89.5 million bond levy before the voters was moved and seconded. This motion required a two-thirds

majority vote of the Board for passage. A similar levy had been defeated by the voters in 1969, and there was Board discussion about the severe need for school construction in the district. One of the Board members then made the following statement:

> So I would like to read this because the concern that I have had . . . as a Board member is that I have been appeased and put in position where I had to go along, and I think that my conscience won't allow me to go along with things that I think are wrong now and have been wrong for many, many years.
>
> We have made several simple requests of this Board, and none of these were honored. And this is the essence today where we voted in the usual four-to-three manner.
>
> I don't mind being voted down. I don't mind being wrong. But I certainly think that the world and the nation have pointed out repeatedly that some of the things that happened in Columbus are wrong. . . . We [black Board members] have been told that we should not deter the education of kids by voting against the bond issue because we need more, we need bricks, and I think that this is one thing that this Board is in agreement with. We do need more than bricks, but what goes on behind those walls is much more important to the lives of kids than the fact that we need buildings.
>
> . . .
>
> [T]he thing that we as a group ask, number one, [is] that this Board give a sincere statement to the effect that either segregated education is good or integrated education is good.
>
> . . .
>
> [I]t all goes back to the statement, this positive statement of accord, for what is the best possible education for boys and girls in Columbus, and how it can best be achieved. And since we can't come to that accord, we feel we would be forcing something on the public that they not only

> wouldn't want to vote for, but would vote down and for that reason I cannot support the bond issue.

The resolution concerning the bond levy did not pass at the June 27 meeting. Three weeks later, at a July 18, 1972, meeting, the Board adopted the formal goal statement concerning integrated educational opportunities which is set out in Part III(A) of this opinion. At the same meeting, the Board voted unanimously to submit the bond levy to the voters.

The "Promises Made" pamphlet included a section styled "How Will This Bond Issue Enhance or Restrict the Process of Racial Integration?" The Board's July 18, 1972, formal goal statement was quoted. The Board's resolution included the statement, "The Superintendent of Schools shall implement this policy by the development of proposals for the approval of the Board of Education." "Promises Made" included the following statements (emphasis supplied):

> New buildings will be located whenever possible to favor integration. In such areas, school attendance area boundary lines *or organizational changes* will be made to improve the opportunity for schools to be integrated without resorting to unreasonable gerrymandering.

In a cover letter included with "Promises Made," Superintendent Ellis stated:

> It is vital that the Columbus Board of Education and school administration keep the promises they have made while promoting the school bond issue. Public faith in all public institutions appears to be low. One way to help rebuild good faith is to follow the principle that a promise made should be kept.

The Columbus voters approved the November 1972 bond levy by a 55.7% majority. When Innis Road Elementary was completed, Dr. Ellis complied with his duty under the Board's July 18, 1972, resolution, and he kept his bargain with the

voters. He presented an educationally sound, integrative alternative to the Board concerning Innis and Cassady. Here, he in effect said, is an opportunity to use school attendance area boundary lines and organizational changes to improve integration of schools without resorting to unreasonable gerrymandering. The Columbus Board of Education refused the offer.

IV. CONSTITUTIONAL QUESTIONS

A. The Concept of "Intent"

Recognizing the enormous importance attendant to the Court's duty to correctly apply the law to the facts of this case, the parties have provided extensive arguments in efforts to persuade the Court toward their respective legal theories. The Court will first set forth a number of rather general legal propositions about which the parties apparently have little real disagreement.

In order to receive any remedial action from the Court, plaintiffs must show that their constitutional rights have been violated. In *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 (1973), the Court phrased the requirement:

> [P]laintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.

Therefore, regardless of the existing statistical racial imbalance of all or any of the Columbus schools, this Court cannot and should not issue any remedial order if there has not been shown a deprivation of a constitutional guarantee which caused the imbalance. See also *Washington* v. *Davis*, 426 U.S. 229 (1976). Racial imbalance in a school system *solely* caused by discrimination in housing does not provide a basis for a Court to find that school authorities have violated constitutional rights. See *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied* 389 U.S. 847 (1967). Mere

racial imbalance resulting from population shifts would not be enough to constitute unlawful segregation in the constitutional sense. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-24 (1971).

In *Keyes* the Supreme Court held that "where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." 413 U.S. at 201. After the *Keyes* case was decided, the United States Court of Appeals for the Sixth Circuit set out the elements of proof involved in a school desegregation case. That Court stated:

> A finding of de jure segregation requires a showing of three elements: (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools.

Oliver v. *Kalamazoo Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974) (footnote omitted), *cert. denied* 421 U.S. 963 (1975).

Particularizing these legal principles to the instant case, if plaintiffs have been able to prove purposeful or intentional acts or omissions by defendants which have caused a meaningful part of the Columbus school system to be unconstitutionally segregated, then defendants are under an obligation to show that racial imbalance in the other components of the system is not the result of their purposeful acts or omissions. See *Higgins* v. *Grand Rapids Board of Education*, 508 F.2d 779, 789 (6th Cir. 1974).

As I recall the briefs and oral arguments of the parties, the litigants recognize the obligation of plaintiffs to show certain intentional or purposeful acts or omissions of the defendants

or their predecessors in office. Before turning to a discussion of the words "intent or purpose," it is helpful to confront the Columbus defendants' contention that the present Superintendent and Board members should not be deemed responsible for acts done by other persons who held those offices many years ago. Since these defendants are sued in their official capacities, the official acts of their predecessors are cognizable under certain circumstances. Obviously, if former segregative acts are later nullified or if the substantial impact of such acts or omissions has been attenuated by time or by changed social conditions to the extent that no substantial impact of the acts or omissions remains to injure the plaintiffs, then they are of no significance. Mr. Justice Brennan wrote in *Keyes*, 413 U.S. at 210-211, as follows:

> The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

The Court, then, may consider the actions and omissions of defendants' predecessors in office.

The concept of intent is often used as jargon in the legal litany, and has been the subject of much discussion by both courts and commentators. The intent or purpose requirement is extremely important in this case, and must be clearly resolved by the Court. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, — U.S. —, — (1977).

The intent contemplated as necessary proof can best be described as it is usually described – intent embodies the

expectations that are the natural and probable consequences of one's act or failure to act. That is, the law presumes that one intends the natural and probable consequences of one's actions or inactions. In order for an act to be intentional, it need not only be expected to visit harm or ill will on others. Some intentional acts obviously are designed to produce a harmful result; other such acts are not so designed.

In their post-trial reply brief, the intervening plaintiffs devote a number of pages to a discussion of the concept of intent. These plaintiffs evidently read the Columbus defendants to be arguing in their brief that racial animus (malevolent discriminatory purpose) is the intent standard to be applied in cases such as this. At closing arguments, counsel for the Columbus defendants set the record straight:

> Plaintiffs in their reply brief argue that the Columbus Board was taking the position that to find liability, the Court would have to find that individual school board members were motivated by racial animus or malice or intended to do actual harm to black students. We do not take that position. That position was not taken in our brief.
>
> We think that a finding of liability requires more than mere proof of racial imbalance or proof of actions taken that did not have the effect of eradicating racial imbalance. We think that the way that the plaintiffs urged the foreseeability test, if you will, is that any action taken which did not bring about some type of racial balance, whether or a percentage based on a percentage-wide system, mean time percentage or a plus or minus type system, that any action taken which did not cause that somehow permits an inference of segregative intent. We think from the plaintiffs' arguments and proofs that what they are really urging this Court to find is that this system is unconstitutional because every one of the 170 schools or every one of the 100 schools they built since 1950 did not open with the roughly equivalent racial balance. In

so doing, plaintiffs urge the Court to infer segregative purpose then from proof of acts, regardless of whether those acts were justified by educational concerns. We think that there is more to the test of intent than simply whether it was foreseeable that that action would in and of itself cause racial imbalance.

Now, if I can for a minute, I would like to turn to a couple of Sixth Circuit cases, mainly *Bronson* [v. *Board of Education of the City School District of Cincinnati*, 525 F.2d 344 (1975), *cert. denied* 425 U.S. 934 (1976)]. The *Higgins* case is clear, I think, that intent does not mean malice. I don't know how the plaintiffs got that point from our brief. I don't see it there, and I think maybe they – I don't know, but maybe they wanted to make that argument so they could talk about this today. I am not sure.

The parties apparently do not disagree so much about the law as they do about its application to the facts of the case.

My review of the law convinces me that the plaintiffs need not prove that the defendants intended to do harm, or acted with ill will.[3] They need only prove that school officials in-

[3] The discussion of this problem in *Hart* v. *Community School Board*, 512 F.2d 37, 48 (2d Cir. 1975) is helpful. That court focused on the issue by making an assumption: "We assume that mere inaction, without any affirmative action by school authorities, allowing a racially imbalanced school [or school system] to continue, would amount only to *de facto* rather than *de jure* segregation. Since here there has been a finding of affirmative action, coupled with intentional inaction, the case is different." The *Hart* court then stated:

> We conclude that enough has been shown of intentional state action through the community school board and its predecessor local school board to support a finding of segregative intent from the foreseeable consequences of action taken, coupled with inaction in the face of tendered choices. Instead of remanding, we treat the District Court's finding of a lack of racial motivation as irrelevant in the face of his findings of foreseeable effect.

Hart v. *Community School Board*, 512 F.2d 37, 51 (2d Cir. 1975) (footnote omitted).

The defendants refer the Court to decisions of the United States Court of Appeals for the Ninth Circuit which may be read to require proof of desire to discriminate as a necessary predicate for a finding of unconstitutionality. In *Soria* v. *Oxnard School District Board of*

tended to segregate. It is well within reason to believe that a person may intend to segregate or cause apartness for socially admirable reasons. It can be argued that many genuinely believed, perhaps some yet believe, that it is best to educate children with other children, administrators and faculty of their own race. Some may believe in complete sincerity that the total community good will be enhanced by segregation. As Mr. Justice Stewart wrote when he was a Circuit Judge in the case *Clemons* v. *Board of Education of Hillsboro*, 228 F.2d 853, 859 (6th Cir. 1956) (concurring opinion):

> The Board's subjective purpose was no doubt, and understandably, to reflect the "spirit of the community" and avoid "racial problems" as testified by the Superintendent of Schools. But the law of Ohio and the Constitution of the United States simply left no room for the

Trustees, 488 F.2d 579, 585 (9th Cir. 1973), *cert. denied* 416 U.S. 951 (1975), the Ninth Circuit read *Keyes* to require a "determination that the school authorities had intentionally discriminated against minority students by practicing a deliberate policy of racial segregation." The Ninth Circuit re-affirmed this reading in *Johnson* v. *San Francisco Unified School District*, 500 F.2d 349, 351 (9th Cir. 1974). In *Soria*, the Ninth Circuit sent the case back to the trial court for a determination of whether segregative intent should be inferred. 488 F.2d at 588. It did the same thing in *Johnson*, 500 F.2d at 352. A district court in the Ninth Circuit recently summarized the posture of the law in that circuit as follows:

> Thus, under the Ninth Circuit formulation of the standard for unconstitutional *de jure* segregation, the school board is precluded only from practicing a purposeful policy of racial separation in the school system; the district is under no affirmative duty to improve racial balance in the schools. However, where the school board claims that actions which perpetuated racial imbalance were motivated by proper educational concerns, it is the function of the trial court to scrutinize closely the school board decision-making process to assure that false or facile justifications do not mask purposeful discrimination.

Diaz v. *San Jose Unified School District*, 412 F. Supp. 310, 330 (N.D. Cal. 1976).

The difference, if any, between the Second Circuit's approach to the standard of liability and that of the Ninth Circuit appears to be that the Second Circuit would affirm a finding of liability based upon proof of affirmative intentional acts and omissions after notice which foreseeably result in segregation even in the absence of desire to segregate. The Ninth Circuit would appear to require proof of a deliberate policy of segregation, but would permit this requirement

> Board's action, whatever [subjective] motives the Board may have had.

Intentional segregation of black school children by public officials is unconstitutional whether caused by those truly caring about blacks or those calloused to their concerns.

Perhaps one of the questions in this case can be posed in this fashion: If a board of education assigns students to schools near their homes pursuant to a neighborhood school policy, and does so with full knowledge of segregated housing patterns and with full understanding of the foreseeable racial effects of its actions, is such an assignment policy a factor which may be considered by a court in determining whether segregative intent exists? A *majority* of the United States Supreme Court has not directly answered this question regarding non-racially motivated inaction. On the other hand, the United States Court of Appeals for the Sixth Circuit has addressed the question as follows:

> It is thus seen that the law imposes no affirmative duty upon school officials to correct the effects of segregation resulting from factors over which they have no control. Neither are they operating a dual system when they fail accurately to anticipate the full effect of their racially

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to be met by the drawing of reasonable inferences from evidence of defendants' intentional acts and omissions.

The *Hart* court describes its differences from the Ninth Circuit decisions as largely semantic. I believe it is somewhat more than semantic, but, in any event, the law of the Sixth Circuit is applicable in the case at bar.

In *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied* 421 U.S. 963 (1975), the Sixth Circuit held:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

See also *Higgins* v. *Board of Education of City of Grand Rapids*, 508 F.2d 779 at 791, 793 (6th Cir. 1974).

> neutral retention of a neighborhood school system, absent a finding of segregative intent.
>
> . . .
>
> . . . While it is true that a Court may *infer* such an intent from the circumstances there is no authority for the proposition that such an intent *must* be inferred in all cases where segregation patterns exist in fact. The inference is permissible, not mandatory.

Higgins v. *Board of Education of City of Grand Rapids*, 508 F.2d at 791, 793 (emphasis in original).

I do not read the Sixth Circuit cases as holding that *Keyes* forbids the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn. A standard requiring plaintiffs in a school desegregation case to adduce *direct* proof of a "racial motive" on the part of a multi-person school board would border on the impossible. There is nothing new or unique about drawing reasonable inferences from facts found, even when essential elements of proof are supplied from inferences drawn.

Applying the *Higgins* standard, I believe that the question posed above should be answered in the affirmative. Substantial adherence to the neighborhood school concept with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.

B. Drawing the Inference of Segregative Intent

The Columbus defendants argue that the official acts of the Columbus Board of Education have in recent history been racially neutral. They contend that the Board has acted in conformity with the neighborhood school philosophy, and that the racial imbalance which admittedly exists in the Co-

lumbus Public Schools is the sole result of housing segregation and other factors which are beyond the control of school officia's. If the Columbus Public Schools were ever unlawfully segregated, say these defendants, then intervening decades of racia'ly neutral Board policies, and certain recent efforts of the Board and of school administrators, have completely cleansed the school district of any present and continuing effects traceable to past illegalities.

P'aintiffs argue to the contrary. They direct the Court's attention to a series of Board actions, both remote and recent, which they contend are inexplicable except by reference to segregative intent. They assert that during this century the Columbus defendants and their predecessors in office have repeatedly engaged in purposeful and overt segregative acts. Against this background, they attack the Board's adherence to the neighborhood school philosophy, arguing that such adherence was not racially neutral in light of all the evidence adduced at trial. They insist that on this record it is entirely reasonable to infer segregative intent.

Notice to the Board

If there exists in this case a factor which distinguishes it from some other northern desegregation cases, it is the proof adduced concerning notice to the Columbus Board of Education. Various segments of the community, notably black parents and civic organizations, have repeatedly and articulately vocalized concern, anger or dismay concerning both overtly segregative actions and lost integrative opportunities.

As mentioned hereinabove, even before the turn of the century black citizens complained about the plight of black students in Columbus. In 1909, Charles W. Smith took the Columbus Board to court in a futile effort to secure equal rights for b'ack school children. Since the 1954 *Brown* decision, the Columbus defendants or their predecessors were adequately put on notice of the fact that action was required to correct

and to prevent the increase in racial imbalance. The local NAACP group, Columbus Urban League, Columbus Metropolitan League of Women Voters, Columbus Area Civil Rights Council, Columbus Metropolitan Council on Quality Integrated Education, the Columbus Board-sponsored Ohio State University Advisory Commission on Problems Facing the Columbus Public Schools, and officials of the Ohio State Board of Education all called attention to the problem and made certain curative recommendations. An assistant state superintendent for public instruction testified in part:

> Q. Mr. Greer, did you or your staff ever recommend that the Columbus administration employ various integrative techniques?
>
> A. Yes, sir.
>
> Q. Like what?
>
> A. Well, in several of the sessions, early sessions, the question came up — this question came up: Is it possible or would it be possible for Columbus City to use any of the eleven or twelve different techniques that are available in the Department of Health, Education and Welfare handboook, pairing of schools, magnet schools, changing of boundary lines and so on, of the different kinds of procedures normally used in all these desegregation efforts, and we made recommendations based on, well, at least five or six of the different methods that seemed to be feasible for this city.
>
> You may begin by moving certain boundaries just a half mile or two blocks in some cases in any number of cities to make change.
>
> Others, you would have to use other methods such as pairing.
>
> In some sections of the city, it might have required setting up magnets.
>
> We even discussed the business of open enrollment and how much impact it would have when you combined it with all the other types of methods, yes.

The Ohio State University Advisory Commission on Problems Facing the Columbus Public Schools was appointed by Ohio State University President Novice G. Fawcett at the request of the Columbus Board of Education. The Commission was asked to clarify some of the problems facing the schools and to offer recommendations which would help solve them. In a report dated June 15, 1958, the Commission concluded that there were racially segregated schools in Columbus. The Commission recommended:

> A fundamental barrier to the achievement of racial integration has been the construction of new housing, high rise, multiple and single dwelling, public and private, that is in effect segregated when it opens. New segregations crop up faster than the schools can achieve integration no matter how hard they try. The Commission recommends, therefore, that the Board of Education take immediate steps to place all plans for new school construction or additions to existing facilities under pre-construction open housing agreements hammered out in advance.
>
> . . .
>
> If such a policy were in effect in Ohio, it would: (1) encourage orderly development of open housing; (2) permit the interests of the business, industrial, and economic sectors of the community to combine with the civil rights interests in a forthright, genuine and highly creative set of policies to achieve outstanding educational as well as other urban improvements; (3) stand against the tendencies to resegregate which are so prominent in most metropolitan areas; (4) make less necessary large-scale transportation programs to achieve equal educational opportunity; (5) prevent the occurrence of new segregations which often take place when new schools are opened; (6) fit with other attempts to desegregate schools where de facto segregation now exists in Columbus; (7) permit the Board of Education to concentrate on segregated sections of the community allowing it to work out a managed integration policy for those parts of the city; and (8) set

> an immediate example of compliance with recent federal legislation on open housing.
>
> . . .
>
> The mobility of both the black and white populations in many sections of the city will undoubtedly continue for a period of years – at least until genuine open housing is achieved in the metropolitan area. During the era of rapid population movement, the school system must pursue deliberate integration practices.

From a careful review of the facts, I believe it fair to say that the Columbus defendants' response to notice of the racial imbalance problem and to a mass of advice about alternatives has been minimal. In 1968, some years after receiving the Ohio State University Advisory Commission report, the Columbus Board developed an Urban Education Coalition, initiated a series of neighborhood seminars, and went on record stating that efforts would be accelerated to achieve better racial distribution in the attendance areas of the Columbus Public Schools, to exploit opportunities for interracial educational experiences involving pupils in suburban districts with Columbus pupils, to plan new approaches to integrated education, to encourage teachers to develop wholesome feelings toward minority group children, to understand more fully the problems of such children, and to recruit black teachers, supervisors and administrators. Notably absent was any *action* to adopt the more substantive areas of the Commission's recommendations as set forth above.

As is noted earlier in this opinion, a resolution, defeated by a majority of the Board would have created a site selection advisory board designed to provide a mechanism for preventing the selection of construction sites which would result in racially segregated schools. In 1973 a motion that the Columbus Board of Education formally request the State Department of Education to develop and present to the Columbus Board plans for effectively desegregating the Columbus Public Schools was

defeated. Also, the Board declined to apply for federal funds for desegregation.

Defendant Dr. John Ellis, Superintendent of Columbus Schools, stated in regard to methods used for education of black and white children:

> Q. What steps are you taking to achieve that in Columbus?
>
> A. The major effort that we have taken I would characterize as two-fold. First, through the school building program, we have added a variety of career centers that are open and available to students from across the school district. At the elementary and junior high school level, we have designated schools as developmental learning centers that are open to children beyond the neighborhood district. We are also offering different alternative schools such as an informal school, a traditional school, an IGE school, a positive reenforcement school, all schools that will have students from across the entire school system. So one thrust is to insure that we have a wide diversity of educational programs that will appeal to the great needs of a metropolitan area.
>
> The second part of our approach, and all of this I assume could be embraced under the label "Columbus Plan," is to insure that pupils know about the opportunities and that a transportation network is created so that the opportunities are not merely ephemeral but can become actual.

The action of the Columbus Board was described at trial by its then-president: "[W]e are putting all our cards, if you will, on the Columbus Plan because it is a positive plan and because people seem to accept it." Another member of the Board opined that she does not believe in desegregation, does not view the Columbus Plan as a desegregation plan, but does believe in voluntary integration.

Neighborhood School Concept

Educators, state officials, parents and children all may derive benefits from a neighborhood school policy. While it is not the only available policy, the Court recognizes its worth. Savings in time and money may result from the policy.

Chief Judge Battisti has remarked as follows concerning the neighborhood school concept:

> Of all the issues raised at trial, perhaps none engendered as much discussion as the local school board's purported "neighborhood school policy." At various times, such policy was both a sword and a shield. The plaintiffs wielded it as an offensive weapon and viewed the board's application of the neighborhood school policy as clear evidence of its segregative intent; the board, on the other hand, cloaked itself in the neighborhood school policy viewing such policy not only as a viable defense, but also one mandated by law.

Reed v. *Rhodes*, 422 F. Supp. 708, 790 (N.D. Ohio 1976).

Many of life's difficult decisions, surely many decisions of this Court, require that priorities be established among known social pluses. This is such a case. The protection of constitutional rights of those who litigate here is this Court's most important function. A neighborhood school policy, revered by many as it is, cannot be a contributor to unconstitutional deprivation. Those who rely on it as a defense to unlawful school segregation fail to recognize the high priority of the constitutional right involved. The Chief Justice of the United States, writing for a unanimous Supreme Court, has stated in this regard:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not

> equal in a system that has been deliberately constructed and maintained to enforce racial segregation.

Swann, 402 U.S. at 28.

At trial the Court did not hear any evidence disputing the value of providing an integrated education. The Court is mindful that many citizens and educators sincerely dissent from the law that favors the non-segregated education of our children. Many believe that court remedies designed to foster integregated education are not educationally worth their trouble. This Court need not enter this popular debate. The existing applicable law, as I understand it, will be applied; nothing more, nothing less.

Residential Segregation

In *Austin Independent School Dist.* v. *United States*, — U.S. —, — (1976), Mr. Justice Powell, speaking in a concurring opinion for himself and two other justices, stated:

> The principal cause of racial and ethnic imbalance in urban public schools across the country – North and South – is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing – whether public or private – cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.

The conclusions I draw from the facts of the instant case are somewhat congruent with that general statement. Counsel for the defendants have objected to testimony of racial residential segregation; however, the evidence, in my view, is relevant, and it has been considered.

Intervening plaintiffs' expert witness Dr. Karl Taeuber, a University of Wisconsin professor of sociology with outstanding

qualifications, testified concerning a summary statistical index of the degree of black-white racial segregation. The index is a scale that goes from 0 to 100. Zero represents a situation of no residential segregation by race. No segregation means that in the census data that every single city block would have the same percentage of white and blacks as the city ratio of black to white households. For example, if there are 20% blacks in the city, then every block would have 20% black and 80% white. That would be zero residential segregation. If every block were completely occupied by blacks or completely occupied by whites, that would be complete segregation; the index value would be 100. Based on census data in evidence, Dr. Taeuber evaluated Columbus in certain census years as follows:

Year	Index
1940	87.1
1950	88.9
1960	85.3
1970	84.1

Dr. Taeuber concluded that blacks who have economic alternatives available seek to avoid living in a 100% black area, but that their choices are constrained because in reality there is a dual housing market; one for blacks and another for whites.

Housing segregation has been caused in part by federal agencies which deal with financing of housing, local housing authorities, financing institutions, developers, landlords, personal preferences of blacks and whites, real estate brokers and salespersons, restrictive covenants, zoning and annexation, and income of blacks as compared to whites.

The Court finds that in Columbus, like many other urban areas, there is often a substantial reciprocal effect between the color of the school and the color of the neighborhood it serves. The racial composition of a neighborhood tends to influence the racial identity of a school as white or black. This identifi-

cation comes in the form of student, teacher, and administrative assignments as well as the location and attendance boundaries of the school. When the number of black pupils increases, the number of black teachers increases, and a black principal is assigned; the school then becomes less attractive for white students to attend. The racial identification of the school in turn tends to maintain the neighborhood's racial identity, or even promote it by hastening the movement in a racial transition area. White families tend to cease migrating into such a neighborhood, and tend to move out of the area.

The Court has received considerable evidence that the nature of the schools is an important consideration in real estate transactions, and the Court finds that the defendants were aware of this fact. The defendants argue, and the Court finds, that the school authorities do not *control* the housing segregation in Columbus, but the Court also finds that the actions of the school authorities have had a significant impact upon the housing patterns. The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what Columbus schools or housing would have looked like today without the other's influence. I do not believe that such an attempt is required.

I do not suggest that any reasonable action by the school authorities could have fully cured the evils of residential segregation. The Court could not and would not impose such a duty upon the defendants. I do believe, however, that the Columbus defendants could and should have acted to break the segregative snowball created by their interaction with housing. That is, they could and should have acted with an integrative rather than a segregative influence upon housing; they could and should have been cautious concerning the segregation influences that are exerted upon the schools by housing. They certainly should not have aggravated racial imbalance in the schools by their official actions.

Recent Efforts

The Court is impressed with the positive efforts of the Columbus defendants to provide a number of innovative educational alternatives. Columbus in the near future will have programs of vocational, alternative and special education which will compare favorably with any system in the country. The new Fort Hayes training center presents an opportunity for education which certainly will provide students with more and different marketable skills. Participation in the Columbus Plan nears 4,000 students, and full transportation is now provided. The Columbus defendants forecast, and the Court agrees, that substantial numbers of students will participate in these programs in the years to come.

However, no witness testified, no exhibits show, and I am unable to find that the sum of the new programs has any probability of substantially curing the system's racial imbalance, which the Court finds directly resulted from defendants' intentional segregative acts and omissions. Increased numbers of majority white schools have black administrators employed. However, 70% of all black principals were assigned to identifiably black schools at the time of trial.

The number of black teachers in each school almost compares to the ratio of black to white teachers in the total system. Suffice it to say that this has occurred only after the Ohio Civil Rights Commission's complaint and the consummation of a consent order before that Commission. Moreover, the Court cannot find, as plaintiffs urge, that the Columbus defendants have failed to comply with the consent order and have downgraded efforts to recruit black faculty and administrators. The effort to comply with the consent order appears to be substantially successful; also, the effort to recruit black teachers appears to have been sincere and reasonable.

The recent efforts of the Columbus defendants are in many ways highly commendable, but fall far short of providing the

Court a basis to find that the defendants are solving the constitutional problems the evidence reveals.

For example, there is little dispute that Champion, Felton, Mt. Vernon, Pilgrim and Garfield were de jure segregated by direct acts of the Columbus defendants' predecessors. They were almost completely segregated in 1954, 1964, 1974 and today.[4] Nothing has occurred to substantially alleviate that continuity of discrimination of thousands of black students over the intervening decades. Neither the magnet alternative school nor the Columbus Plan will predictably provide students at those schools their constitutional rights.

Burden of Proof

As mentioned hereinabove, the *Keyes* court provided for a shift in the burden of proof when plaintiffs' proofs reach a certain standard. A defendant must then assume the obligation to show that the constitutional right to equal protection has not been denied to plaintiffs. *Keyes, supra,* 413 U.S. at 208.

In the instant case I have found that a number of schools on the near-east side of Columbus — Felton, Champion, Garfield and Pilgrim — were deliberately segregated or racially imbalanced by acts of school officials. During the intervening years the imbalance has survived unattenuated by any acts of defendants. Years of the practice of racial considerations in the assignment of teachers and administrators have negatively influenced the racial character of the schools. Recent acts have lessened the sting of the practice, but have not served to substantially remove the evil it helped create. Again, recent concern in this regard is too little and too late to abate the need for a remedy.

Defendants' evidence falls short of showing that the racial character of the school system is the result of racially neutral

[4] Felton Elementary School was closed in 1974. At that time, it was a racially identifiable black school.

social dynamics or the result of acts of others for which defendants owe no responsibility. Defendants have not proved that the present admitted racial imbalance in the Columbus Public Schools would have occurred even in the absence of their segregative acts and omissions, see *Mt. Healthy City School District Board of Education* v. *Doyle*, — U.S. — (1977).

Finding of Segregative Intent

From the evidence adduced at trial, the Court has found earlier in this opinion that the Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown I* was decided in 1954. The Court has found that the Columbus Board of Education never actively set out to dismantle this dual system. The Court has found that until legal action was initiated by the Columbus Area Civil Rights Council, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition of the student enrollment at those schools. The Columbus Board even in very recent times, has approved optional attendance zones, discontiguous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has abjured workable suggestions for improving the racial balance of city schools.

Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion.

Higgins v. *Board of Education of City of Grand Rapids*

All parties cite the *Higgins* case, 508 F.2d 779 (6th Cir. 1974). The Sixth Circuit affirmed the well-written trial court decision, which found in part for the defendant Grand Rapids Board of Education. It may be worthwhile to compare some of the *Higgins* facts to the facts of our Columbus case. Like Columbus, there were many schools racially imbalanced in Grand Rapids. All of the high schools, however, had been racially balanced. Following a master plan adopted by the school board, Grand Rapids made substantial improvement in racial balance when, in attempting to relieve overcrowding of the innercity schools, the conscious decision was made to use integrative feeder patterns to outlying schools. In Grand Rapids, few new schools opened racially identifiable, while in Columbus many new schools have opened racially identifiable in recent years.

The trial court in *Higgins* did not find that a substantial part of the Grand Rapids school district was officially segregated either before or after the *Brown I* decision. The plaintiffs adduced no proof of intact busing in Grand Rapids. Plaintiffs challenged only "a few instances" of boundary line and feeder pattern changes, and the Court of Appeals held that these proofs "were properly dismissed by the district court as too isolated to support charges of gerrymandering to achieve forbidden racial discrimination." 508 F.2d at 786. Plaintiffs considered only one optional zone created by the Grand Rapids Board of Education to be "significant," 395 F. Supp. at 459, and as to this zone the trial court held that "the criteria of the school administration in granting the option and in considering attaching the area to the Creston zone were at least completely neutral and . . . there is no credible evidence to support a rational inference of racial overtones or bias in the decision." 395 F. Supp. at 472.

In finding in part for plaintiffs, the United States District Court for the Western District of Michigan noted that up until

1970 most black faculty in Grand Rapids were assigned to predominantly black schools; like Columbus, this condition had improved in recent years in Grand Rapids. Nevertheless, the trial court determined that the practices of the board regarding faculty assignment had violated the rights of plaintiffs under the Equal Protection Clause, and ordered relief concerning these assignments. 395 F. Supp. at 484 and 490.

In affirming, the Sixth Circuit stated:

> Another relevant factor to be considered in assessing the finding below that segregation in the Grand Rapids school system is not the result of intentional acts by the school board, is the testimony of the plaintiffs' own witness that many of the more commonly used or classic segregative techniques found in other cases were absent in Grand Rapids. These devices included intact bussing, bussing blacks past white schools having extra capacity to more distant black schools, widespread use of optional attendance zones, use of multiple and overlapping attendance zones, disparity between physical quality of black and white schools, constant gerrymandering of attendance zones, and discriminatory use of transfer policies.

Higgins v. *Board of Education of Grand Rapids*, 508 F.2d 779, 787 (1974). In contrast, many of these "classic segregative techniques" have been used in Columbus.

C. The State Defendants

Governor and Attorney General

These state officers are defendants in this case. The facts do not show either officer did anything, or failed to do anything that he was obligated to do, which caused plaintiffs the harm for which they seek redress.

The Ohio Constitution clearly places the responsibility for public education upon the State of Ohio. Because local school boards initiate school levies for local voters' consideration, expend funds locally, and generally exercise administrative control over local schools, many people may well believe that such local boards of education have primary responsibility for the maintenance and operation of the public schools in Ohio. In fact, the state remains primarily responsible. This mandate has been our law since the adoption of the 1851 Ohio Constitution.[5]

The Sixth Circuit has commented on the obligation of the state administrative agency at follows:

> Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools.

Brinkman v. *Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974).

At no time have these state defendants *actively* moved to do anything to correct the racial imbalance in the Columbus schools. Nor did they act to make a determination as to whether black children were being deprived of their rights. The State Board and Superintendent assure that such matters as teacher qualifications, school building standards, curriculum requirements and annexations are lawfully administered. See R.C. 3301.07. The Court is of the opinion that the law of Ohio requires that the State Board of Education act to assure

[5] OHIO CONST. art. I, § 7; art. II, § 26; art. VI, § 2 (1851). OHIO CONST. art. VI, § 3 (1912).

that school children in the various local school districts enjoy the full range of constitutional rights. The Board has not done this in Columbus even though it has received sufficient statistical evidence of student and faculty racial imbalance and is well aware of the existence of racially imbalanced schools in Columbus.[6]

[6] Counsel for the State of Education argued as follows during closing arguments.

> I am not pleading ignorance.
>
> . . .
>
> I am saying to the Court that the State Board has constructive knowledge of everything that is reported to the State Department of Education about the racial makeup of pupils and staff in the schools of Columbus. It has constructive knowledge. It is bound by that knowledge.
>
> Now, it is not so much a matter of investigation, Your Honor. It is a question of whether or not, knowing that the State Board and Department should have told Columbus to make certain specific changes, and if Columbus refused to change, should the State Board and Department have threatened to withhold funds? Now, before they can do that, they have to have some reasonable basis to believe what they have constructive knowledge of is a violation of law.
>
> . . .
>
> [W]hen we look at the recommendations that have been made to Columbus [by the State Board], all of this is a panoply of activity that has desegregation as its objective. Now, the plaintiffs claim that the State Board is totally uninterested in desegregation, that it has a policy of maintaining segregation, but I say that this is absurd and does not stand up under the evidence in this record.
>
> The final question, a quasi question, is whether the State Board and Department could have done more. Could they have gone to Columbus and could they have demanded that certain things take place? Sure. We can all do more, but that is not the decisive legal issue. The question is not whether the State Board could have done more. The question is whether the State Board of Education had a policy of maintaining segregation, because that is what the majority of the *Keyes* decision talks about. Did it have segregative intent? The assessment of that question is important to the trier of facts.
>
> . . . [T]he explanation for the State Board's failure to demand that Columbus take certain specific acts and corrective action is not due to a policy of maintaining segregation. It is due, instead, to the State Board's belief that the Columbus Board has certain powers that are given to it by the statutes of Ohio and that the Columbus Board and its Superintendent must be allowed to exercise those powers except where the exercise is in plain violation of the law. It had reason to believe that the Columbus Board was not in violation of the law, and that is the reason that it didn't demand the things that it demanded

The State Board and the State Superintendent are Ohio's resident experts on school desegregation matters. They have the means to collect information, which they have done, to conduct hearings, to make findings, and to enforce orders based on their findings.[7] In 1956 the Attorney General of Ohio advised that the State Board had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, to local districts which segregated pupils on the basis of race in violation of *Brown I*.[8] The facts of this case offer no satisfactory reason for these state officials' failure to perform their duties as advised by the Attorney General. Mere "suggestions" to the Columbus Board were not enough. These defendants cannot be heard to say that they could not understand their obligations; the Attorney General made those clear.

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in Middletown, the things that it demanded in Toledo, the things that it demanded in North College Hill.

The State Board and the Department do not have a policy of maintaining segregation in the State of Ohio. They could do more, but they don't have a policy of maintaining segregation in this state, and their failure to do more is not the product of a segregative or segregationist state of mind.

[7] R.C. 3301.16 provides that the Board shall revoke the charter of any school district which fails to meet the minimum standards. The Board may then dissolve the district and transfer its territory to one or more adjacent districts.

The State of Ohio provides financial assistance through the School Foundation Program to all qualifying, chartered districts in the state. The funds are provided by the legislature and are allocated by the Department of Education among the districts in accordance with the provisions of R.C. 3317.01 *et seq.* The Board disburses substantial federal funds to districts which qualify under different federal programs. Before a district may receive any federal funds, it must submit assurances that it is in compliance with law.

[8] The Attorney General opined:

Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds . . . .

Dr. Kenneth Connell, representing the Columbus Area Civil rights Council, visited the offices of the state defendants in the spring of 1971 and requested that action be taken regarding the Columbus schools. No action was taken. As I understand the state defendants' argument, they claim that they would have investigated had Columbus school officials so requested. This position borders on the preposterous. It cannot reasonably be expected that those who violate the constitution will be anxious for an investigation in order that a remedy may be leveled against them.

The sheer multitude of appellate court decisions cited by the parties arising from school segregation cases all over this country from 1954 until this case was at issue, coupled with notice of the racial imbalance in the Columbus schools, would have led even the most socially optimistic to suspect that Ohio' second largest city might have some problem in that regard which required attention.

The state defendants are to be commended on the accumulation of data, advisory resumes and personnel to be used for desegregation. Dr. Robert Greer has worked long and hard in a leadership role in finding avenues designed to lead to equal educational opportunities. Information was provided to local districts, and rather gentle persuasion employed to encourage desegregation. But some firm action is needed when the horse won't drink the water.

The failure of these state defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise.

V. CONCLUSION

As is not uncommon in complex cases such as this one, the Court in a pretrial decision ordered that the trial of this case be bifurcated, or split into two parts. The first part of the trial, concerning whether the Columbus Public Schools are in fact unlawfully segregated, is now over, and the preceding portions of this opinion are intended to resolve the question of liability in accordance with the evidence and the applicable law. The Court is certifying today's decision for immediate interlocutory appeal. This action should permit any party who is aggrieved by the decision to contest it where the law permits it to be contested, in the United States Court of Appeals for the Sixth Circuit. Whether or not such an appeal is filed, it is now incumbent upon the Court and upon the parties to this lawsuit to proceed apace to the second stage of this proceeding, the remedy phase. In this kind of a case, it is common for the trial court, if liability on the part of the defendants has been proved, to require the defendant school boards to submit proposed plans directed toward the implementation of a remedy. *See, e.g., Brown* v. *Board of Education (Brown II)*, 349 U.S. 294, 299 (1955); *Evans* v. *Buchanan*, 393 F. Supp. 428, 447 (D. Del. 1975); *Morgan* v. *Hennigan*, 379 F. Supp. 410, 484 (D. Mass. 1974); *United States* v. *Board of School Commissioners of the City of Indianapolis*, 332 F. Supp. 655, 681 (S.D. Ind. 1971).

A school desegregation case such as the present one gives a trial court pause for a number of reasons. The evidence in this case harkens back to a previous era in the history of Columbus: a time fresh in the memory of some who testified at trial, when black parents and their children were openly and without pretense denied equality before the law and before their fellow citizens. This case is even more disturbing because it demonstrates the existence of substantial continuing effects of decisions made and actions taken during this bygone era upon the modern Columbus school system. And, since the days

when Columbus and the Columbus Public Schools were openly segregated on the basis of race, those public officials charged by law with the administration of the Columbus Public Schools have for the most part ignored repeated requests and demands for an integrated educational system. They have engaged in overt actions which readily permit an inference of segregative intent. They have repeatedly failed to seize opportunities, large and small, which would have promoted racial balance in the Columbus Public Schools.

A case such as this one is also disturbing because of the social costs which can be associated with the implementation of a remedy. Depending upon the school system involved, these social costs can include substantial expenditures of public funds, inconvenience and hardship for students, unrest on the part of various segments of the community involved, and flight by white residents from the desegregated school district, often resulting in more pronounced racial imbalance and in a loss of tax base. While the plaintiffs must, and will, receive vindication for the deprivation of their constitutional rights, the social costs should not be forgottten in the formulation of a remedy.

No federal trial court has a free hand in determining the scope and terms of a remedy to be applied in a school desegregation case. Far from it. The federal appellate courts, including the Supreme Court of the United States, have since *Brown I* produced scores of school desegregation decisions, including decisions concerning the proper remedy to be applied in such cases. The ongoing litigation concerning the Dayton, Ohio, public schools is a case in point. On February 7, 1973, after an evidentiary hearing, an extremely able and concerned district judge in Dayton filed an opinion which determined that the Dayton Public Schools were unlawfully segregated. On July 13, 1973, after considering three separate desegregation plans submitted to it, the district court essentially accepted a plan submitted by the majority of the Dayton

Board of Education. The plan provided for no transportation of students, and placed minimal reliance upon so-called magnet schools. The plan did include the elimination of all optional attendance zones, the revision of a voluntary student transfer program, and the creation of racially balanced faculty and staff for the Dayton schools.

On appeal, the United States Court of Appeals for the Sixth Circuit agreed with the district court's decision concerning liability, but disagreed with the remedy which it had ordered. Without mentioning transportation of students, the Court of Appeals held that "the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations." *Brinkman* v. *Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974). The case went before the district court again. That court ordered the closing of an all-black high school, the creation of numerous magnet schools, and the continuation of the voluntary student transfer program, but declined to order transportation of students. The case was again appealed to the United States Court of Appeals for the Sixth Circuit, which did not find the remedy plan ordered by the trial court to be acceptable. The Court of Appeals stated, *Brinkman* v. *Gilligan*, 518 F.2d 853, 855-56 (6th Cir. 1975):

> The District Court described the approved plan as "desegregative in intent" and concluded that it would have "an integrative effect." It appears that the plan contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system. We believe, however, that more is required by the Constitution, by recent decisions of the Supreme Court, including those herein cited, and by the previous mandate of this court. As the appellants point out, under the plan approved by the District Court the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful, the vast majority of one-race schools will remain identifiable as such. The District Court's plan fails to eliminate the continuing effects of past segregation and is, therefore, inadequate.

The Court of Appeals sent the case back to the district court, and directed "that the court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*." 518 F.2d at 857.

The Dayton Board of Education attempted to obtain Supreme Court review of the second decision of the Court of Appeals in the Dayton case. The Supreme Court refused to accept the case, 423 U.S. 1000 (1975), and the district court in Dayton was again faced with the question of what remedy was required. This time, the trial court ordered that in all but "exceptional circumstances" each school in the Dayton system must reflect a student racial balance within 15 percentage points of the percentage of black students in the system as a whole. This remedial order required the transportation of a substantial number of Dayton public school students. On July 26 of last year, the Court of Appeals approved this plan over the objections of the Dayton Board of Education. *Brinkman* v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976). The United States Supreme Court has recently agreed to review the Dayton Board's objections to the plan.

The developments in the Dayton case are important here in Columbus for two reasons. First, it is a recent case which sheds light upon the present state of the law governing desegregation remedies in this judicial circuit. The decisions of the United States Court of Appeals for the Sixth Circuit are binding precedent for this Court. Second, the Dayton case is important because the Supreme Court has recently agreed to hear the case and review the Sixth Circuit's decision in it. The Dayton case may provide a vehicle for the Supreme Court to elaborate more fully upon some of the themes discussed by

three of its members in *Austin Independent School District* v. *United States*, — U.S. — (1976). In the meantime, it is a fact of life that decisions such as those made by the Court of Appeals in the Dayton case reflect the state of the law concerning the appropriate remedy to be applied in the present case.

The concurring opinion of three justices in the *Austin* case and the recent decision of the Supreme Court accepting review of the Dayton remedy plan are circumstances which may lead some to believe that the law concerning remedy in desegregation cases is in a state of flux. If such soundings concerning Supreme Court direction are correct, this may be a particularly auspicious time for the litigants to come together and attempt to reach an amicable and fair resolution of the questions presented by the remedy phase of this lawsuit. Meanwhile, it is the obligation of the Court to read the binding appellate court decisions and to act accordingly in the absence of an agreement reached by the parties.

Although the Court has heard volumes of evidence concerning the history and the present posture of the Columbus Public Schools, the Court has not heard the parties relative to the remedy phase of the litigation. Therefore, I cannot state with particularity a precise plan and the ramifications, economic and otherwise, which would result if a particular plan were in fact implemented. Without attempting to be precise, the Court would like to make certain suggestions to the parties which may be helpful in their attempt to negotiate a remedy or, if that is impossible, their preparation of a remedy plan for court review.

Unfortunately, two important considerations compete, both of which importantly impact any proposed desegregation remedy, whether it is imposed by a court or agreed upon by the litigants. On the one hand, there is the *Brown I* principle, still quite valid today, that unlawfully segregated schools are inherently unequal. Because black children are expected and required to grow up, live and work in a majority white society,

it is not only unlawful, it is unfair for public officials, by their actions or their inaction, to promote with segregative intent racially imbalanced schools. On the other hand, there is the fact that a desegregation remedy that may be so burdensome upon a school system as to impair its basic ability to provide the best possible educational opportunities, is no remedy at all. All parents and school children, regardless of color, have a very strong interest in quality schools.

The finding of liability in this case concerns the Columbus school district as a whole. Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter. "[I]t is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal of keeping other nearby schools predominantly white." *Keyes* v. *School District No. 1*, 413 U.S. 189, 201 (1973) (footnote omitted). The evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state school boards.

I believe that is may be possible to eradicate unlawful segregation from the Columbus school system root and branch without embarking upon a scheme which envisions that every school in the district should have the same student racial breakdown as does the school district as a whole. In 1971 the United States Supreme Court held that racial balancing is not required by the Constitution:

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.
>
> . . .

> Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24, 25 (1971). An equitable remedy in a school desegregation case such as this one should provide black school children with the *Brown I* promise of an integrated education, and should at the same time take into account the scope and effect of the actions and omissions upon which the finding of liability is premised.

It is plainly the case in Columbus that had school officials never engaged in a single segregative act or omission, the system-wide percentage of black students would nevertheless not be accurately reflected in each and every school in the district. System-wide statistical remedies have been implemented and approved by many courts, perhaps because of a concern that all schools, parents, children and neighborhoods should be required equally to bear the burdens of desegregation. The fact that such plans have been used in the past does not necessarily mean that they are the only legal alternatives available. In *Swann*, 402 U.S. at 26, the Supreme Court stated:

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

In view of the findings of fact set forth in this opinion, it

is essential that plaintiffs now be afforded relief; if they are not, their constitutional rights will not be vindicated. Each black school child in Columbus must have an opportunity for the integrated education and attendant educational advantages contemplated by *Brown I* and the cases which have followed.

If a limited number of racially imbalanced, predominantly white schools remains under a plan or plans submitted for the Court's approval, those schools would receive close scrutiny under the *Swann* test, and the defendant school authorities would be required to satisfy the Court that their racial composition is not the result of present or past discriminatory actions or omissions of defendant public officials or their predecessors in office. As is noted earlier, it would be extremely difficult to attempt to roll back the clock at this point and determine what the school system would look like now had the wrongful acts and omissions discussed earlier in this opinion never occurred. Officials striving to satisfy the Court that a number of white schools are to remain such because of racially neutral circumstances would have a difficult, but perhaps not an impossible, task.

The foregoing comments and suggestions are by no means innovative. Generally, they incorporate the law as set forth by the United States Supreme Court in the *Swann* case and other cases. Nor are they exhaustive; they are meant only as a point of reference. In order to protect the opportunity for quality education for all the children of our community, the formulation of a fair and reasonable plan to remedy the ills that the Court has found must receive the best efforts of all involved in this complex litigation. The Court sincerely awaits the reception of an appropriate plan or plans providing a fair and lawful remedy for plaintiffs which will enhance the quality of education in Columbus.

ORDER

The Court finds the issues joined in favor of all named plaintiffs and the class or classes they represent, and against defendants Columbus Board of Education and its members, the Superintendent of the Columbus Public Schools, the State Board of Education of Ohio, and the State Superintendent of Public Instruction. The Court finds the issues joined in favor of the defendant Governor and Attorney General of the State of Ohio, and against all named plaintiffs and the class or classes they represent. Judgment concerning liability is entered in accordance with these findings. The Clerk will award all plaintiffs and the class or classes they represent those costs which are allowable to prevailing plaintiffs under the applicable law. These costs will be borne equally by the Columbus Board of Education and the State Board of Education. Pursuant to 28 U.S.C. § 1292(b), the Court certifies that with respect to the above findings of liability this judgment order involves controlling questions of law as to which there are substantial grounds for difference of opinion and further certifies than an immediate appeal from this judgment may materially advance the ultimate termination of this litigation.

It is ORDERED that the defendants Columbus Board of Education, State Board of Education, their constituent members, officers, agents, servants, employees, and all other persons in active concert or participation with them be, and they are hereby permanently enjoined from discriminating on the basis of race in the operation of the Columbus Public Schools, and from creating, promoting, or maintaining unconstitutional racial segregation in any Columbus school facilities.

Defendants Columbus Board of Education and State Board of Education are directed to formulate and submit to the Court proposed plans for the desegregation of the Columbus Public Schools beginning with the 1977-78 school year, within ninety (90) days of the entry of this order. Within twenty (20) days

after the entry of this order, counsel shall advise the Court of the progress of any settlement negotiations concerning an agreed remedy plan.

It is further ORDERED that the Columbus Board of Education be, and it is hereby enjoined from proceeding with construction of new schools or additions to existing schools unless such construction has already commenced. Hereafter, such new construction may proceed only upon prior approval of this Court. It is further ORDERED that the Columbus Board of Education inform this Court and plaintiffs' counsel within twenty (20) days of any construction which has already commenced and of the stage of this construction.

It is so ORDERED.

APPENDIX

Glossary

Racially Identifiable (Imbalanced) and Racially Unidentifiable (Balanced) — The concept of racial identifiability or unidentifiability is used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the actual (or estimated) system-wide percentage of black pupils. Schools which have a percentage of black pupils within this range are racially unidentifiable, or balanced. Schools which have a black population in excess of this range are racially identifiable, or imbalanced, black schools. Schools having a black population less than the range are racially identifiable, or imbalanced, white schools. The Court has accepted the figures used by Dr. Gordon Foster concerning the Columbus Public Schools:

Year	Percentage Black Pupils in System	Statistical Variation	Range
1950-57	15 % (estimate)	± 5%	10 % - 20 %
1957	20 % (estimate)	± 10%	10 % - 30 %
1964 primary	25 % (estimate)	± 15%	10 % - 40 %
1964 secondary	26.6%	± 15%	11.6% - 41.6%
1975	32.5%	± 15%	17.5% - 47.5%

A smaller percentage standard deviation is applied when the system-wide percentage of blacks is low. As the total percentage of blacks increases, the statistical deviation also increases, thus resulting in a broader range of racial unidentifiability or balance.

Use of statistics in this manner provides a rough gauge which is a useful reference point when examining particular

schools. Standing alone, such statistics are of little evidentiary value.

Black and Non-White — Although some of the evidence, including some statistical data, presented at trial used the term "non-white," the Court has used the term "black" throughout this opinion since the evidence does not reflect that Columbus has any other substantial non-white population.

Black School — A school having a black student enrollment in excess of the applicable range of variance from the system-wide percentage of black pupils — that is, a racially identifiable black school. See "racially identifiable."

White School — A school having a black student enrollment which is less than the applicable variance from the system-wide percentage of black pupils — that is, a racially identifiable white school.

One Race School — A school in which 90% or more of the students are of a single race.

Predominantly — The term "predominantly" is used in this opinion in reference to the racial composition of both schools and neighborhoods. The meaning of the term is not subject to precise definition in terms of percentages, but is used to describe statistical racial composition that is substantially outside the range of statistical deviation from the system-wide or community-wide racial percentage. The term is also used to describe instances of racial imbalance from the viewpoint of the residents of Columbus; that is to say, it is used to describe those schools or neighborhoods which the average Columbus resident might describe as black or white.

Dual School System — A school system in which there is officially imposed racial segregation.

Unitary School System — A school system in which here is no, or insignificant, officially imposed racial segregation.

Discontiguous Attendance Zone – A school attendance zone from which the student residents must cross another attendance zone in order to reach their assigned school.

Intact Busing – The practice of transporting a class of students (often with their teacher) from one school to another, keeping the class as an identifiable unit at the receiving school for most purposes, with minimal interaction with the students at the receiving school.

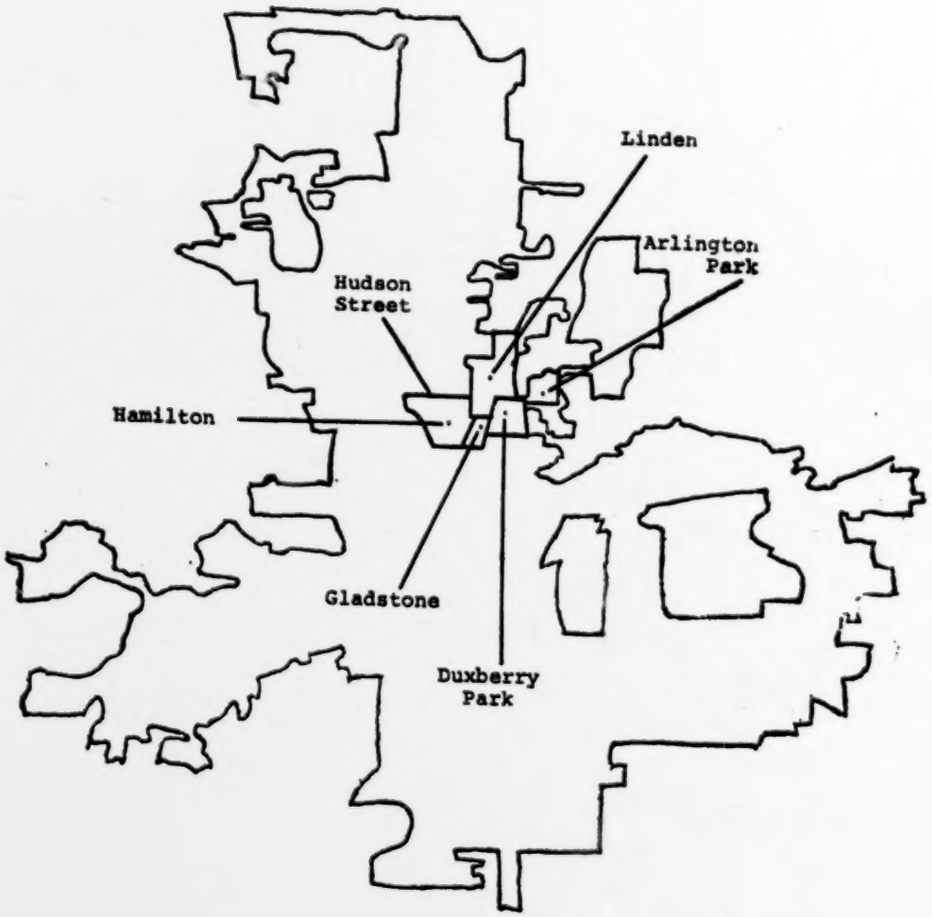
Magnet School – A school with special programs or facilities and an open enrollment designed to attract students from other parts of the school system. Depending upon the location of the school and the availability of transportation, magnet schools may serve as a method of voluntary integration.

Optional Attendance Zone – A portion of a school attendance zone from which the students may opt to attend a specific school other than the one which otherwise serves that area. That is, the student has a choice as to which of two or more schools to attend.

Pairing – A method of improving the racial balance of two schools having diverse racial compositions by consolidating the two attendance areas into a single zone. All of the students in the consolidated attendance area are then assigned to one school for certain grade levels (for example, K-3) and to the other school for the remaining grades (for example, 4-6).

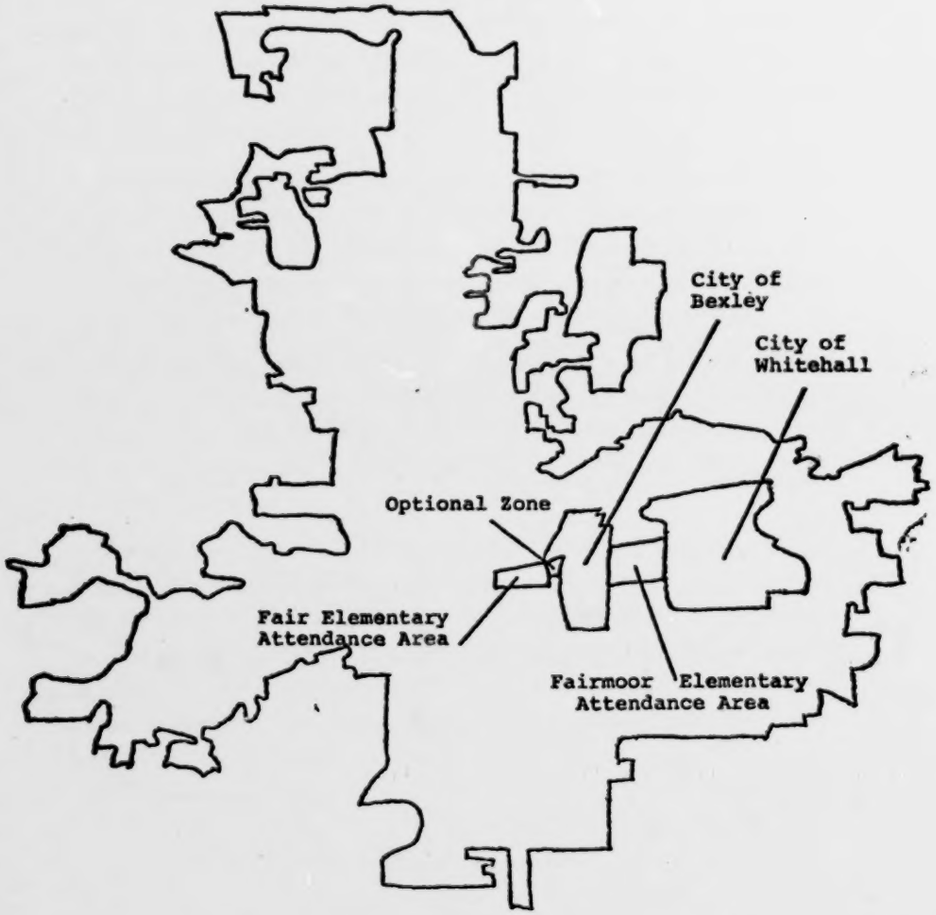
Gladstone, Duxberry Park, Linden,
Hamilton and Arlington Park
Elementary Schools

Map No. 1



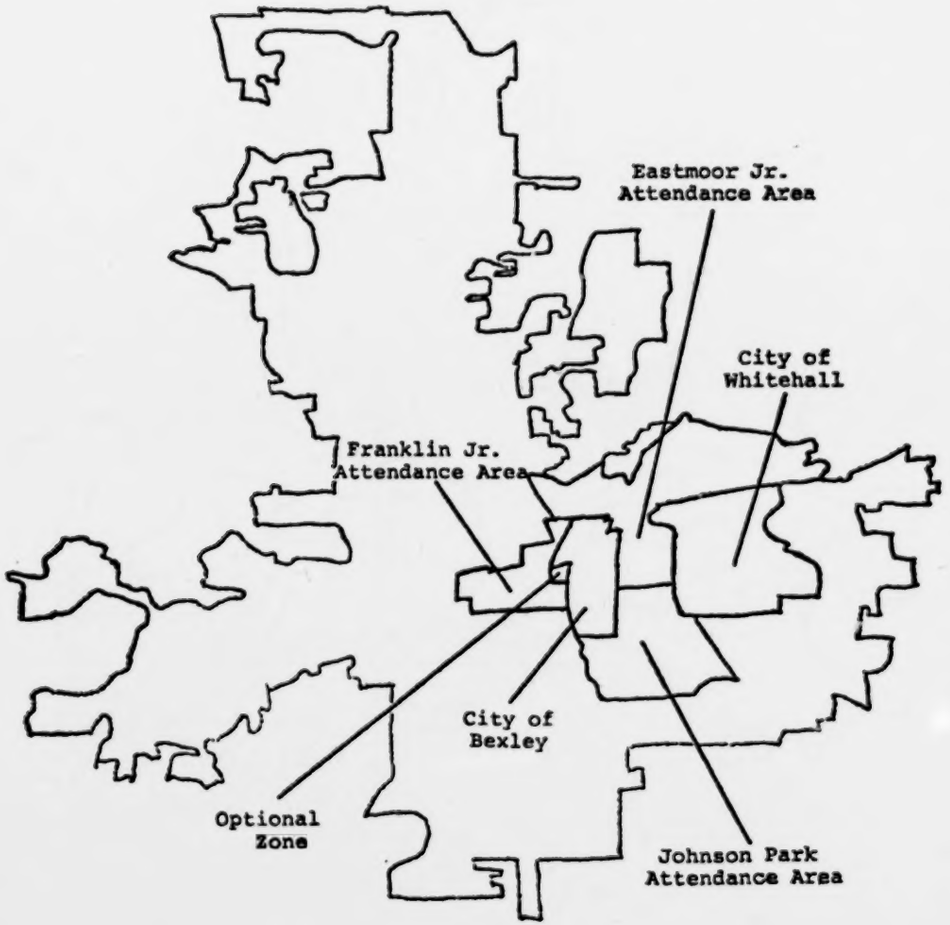
Near-Bexley Option – Elementary Schools

Map No. 2



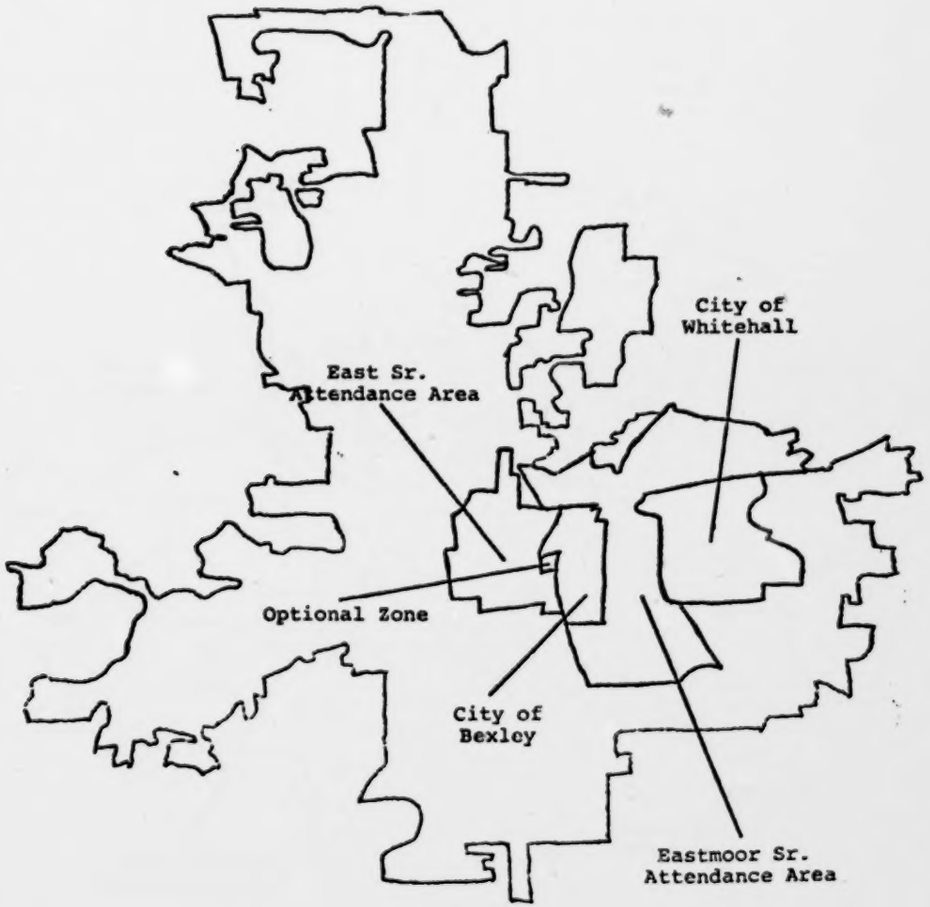
Near-Bexley Option – Junior High Schools

Map No. 3



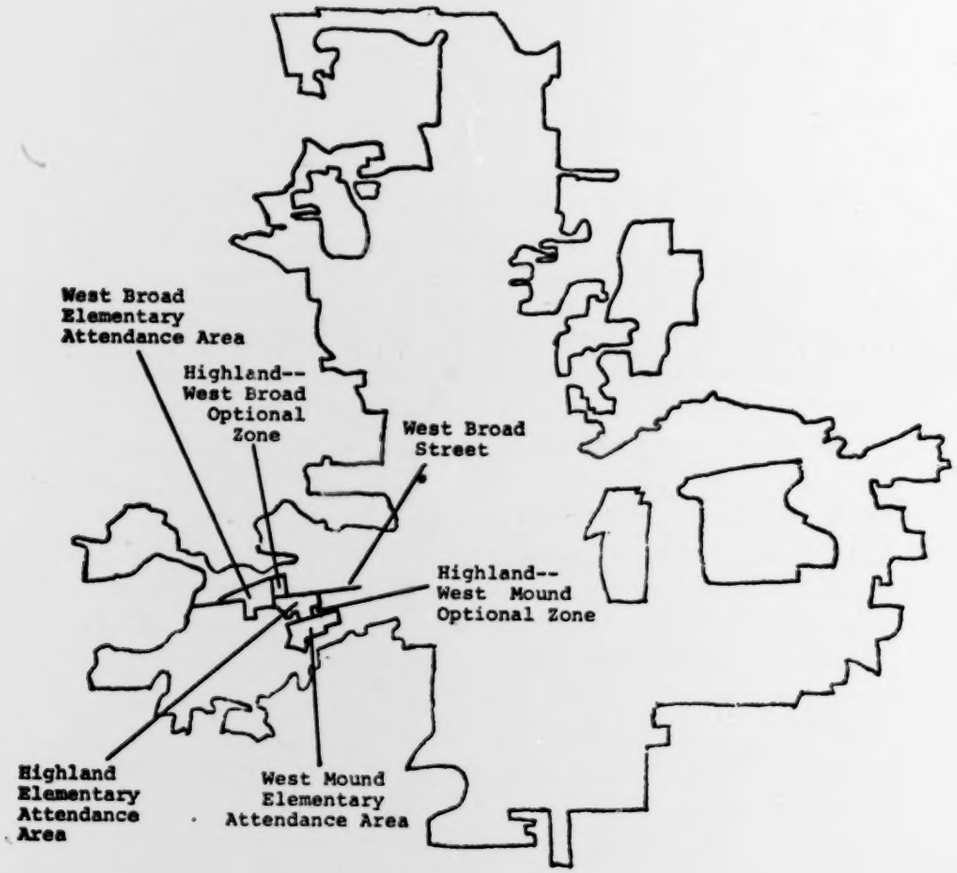
Near-Bexley Option — Senior High Schools

Map No. 4



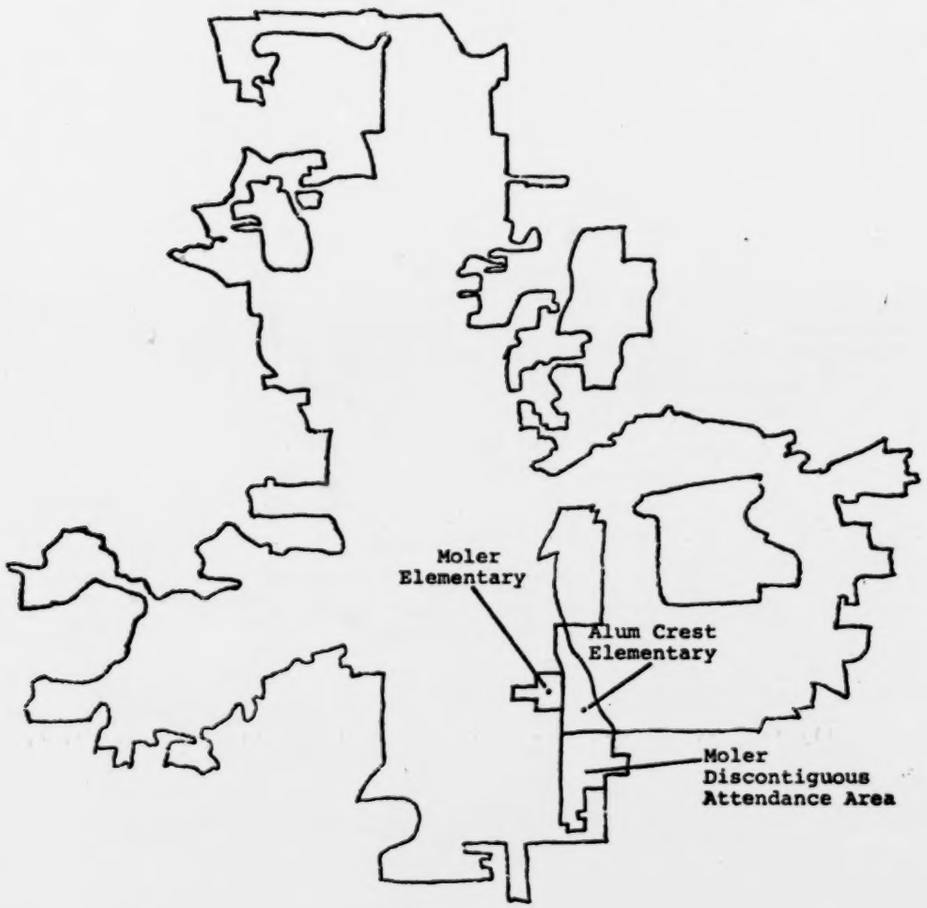
Highland, West Mound and West Broad Elementary Optional Zones

Map No. 5



Moler Elementary Discontiguous
Attendance Area

Map No. 6



UNITED STATES DISTRICT COURT

FOR SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

Gary L. Penick, et al., *Plaintiffs,* v. Columbus Board of Education, et al., *Defendants,*	Civil Action No. C-2-73-248 **JUDGMENT** (Filed March 9, 1977)

This action came on for consideration before the Court, Honorable Robert M. Duncan, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT the Court finds the issues joined in favor of all named plaintiffs and the class or classes they represent, and against defendants Columbus Board of Education and its members, the Superintendent of the Columbus Public Schools, the State Board of Education of Ohio, and the State Superintendent of Public Instruction. The Court finds the issues joined in favor of the defendant Governor and Attorney General of the State of Ohio, and against all named plaintiffs and the class or classes they represent. Judgment concerning liability is entered in accordance with these findings. The Clerk will award all plaintiffs and the class or classes they represent those costs which are allowable to prevailing plaintiffs under applicable law. These costs will be borne equally by the Columbus Board of Education and the State Board of Education. Pursuant to 28

U.S.C. § 1292(b), the Court certifies that with respect to the above findings of liability this judgment order involves controlling questions of law as to which there are substantial grounds for difference of opinion and further certifies that an immediate appeal from this judgment may materially advance the ultimate termination of this litigation.

It is ORDERED that the defendants Columbus Board of Education, State Board of Education, their constituent members, officers, agents, servants, employees, and all other persons in active concert or participation with them be, and they are hereby permanently enjoined from discriminating on the basis of race in the operation of the Columbus Public Schools, and from creating, promoting, or maintaining racial segregation in any Columbus school facilities.

Defendants Columbus Board of Education and State Board of Education are directed to formulate and submit to the Court proposed plans for the desegregation of the Columbus Public Schools beginning with the 1977-78 school year, within ninety (90) days of the entry of this order. Within twenty (20) days after the entry of this order, counsel shall advise the Court of the progress of any settlement negotiations concerning an agreed remedy plan.

It is further ORDERED that the Columbus Board of Education be, and it is hereby enjoined from proceeding with construction of new schools or additions to existing schools unless such construction has already commenced. Hereafter, such new construction may proceed only upon prior approval of this Court. It is further ORDERED that the Columbus Board of Education inform this Court and plaintiffs' counsel within twenty (20) days of any con-

struction which has already commenced and of the stage of this construction.

Dated at Columbus, Ohio this 9th day of March 1977.

JOHN D. LYTER

John D. Lyter, Clerk

APPROVED FOR ENTRY ROBERT M. DUNCAN

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gary L. Penick, et al., *Plaintiffs,* v. Columbus Board of Education, et al., *Defendants.*	Case No. C-2-73-248

MEMORANDUM AND ORDER
(Filed July 7, 1977)

Defendant Columbus Board of Education, citing the June 27, 1977, decision of the United States Supreme Court in the Dayton, Ohio, school desegregation case, *Dayton Board of Education* v. *Brinkman,* moves for leave to amend the proposed remedy plan which it has submitted pursuant to this Court's March 8, 1977, opinion and order, *Penick* v. *Columbus Board of Education,* 429 F. Supp. 229 (S.D. Ohio 1977). In that opinion, the Court traced the history of the Dayton, Ohio, school desegregation litigation. 429 F. Supp. at 264-66. The Court stated, "The concurring opinion of three justices in the *Austin* [*Independent School District* v. *United States,* .....U.S. ..... (1976)] case and the recent decision of the Supreme Court accepting review of the Dayton remedy plan are circumstances which may lead some to believe that the law concerning remedy in desegregation cases is in a state of flux." 429 F. Supp. at 266.

Pursuant to the Court's March 8 order, 429 F. Supp. at 268, the defendant school boards have submitted proposed plans for the desegregation of the Columbus schools. The Court has scheduled a hearing for the week of July 11, 1977, generally concerning the plans, and certainly to provide defendant boards of education an opportunity to meet their *Swann* burden concerning certain predominantly white schools which would remain identifiably white under the submitted plans. The *Swann* burden is as follows:

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all of predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 26 (1971).

Thereafter, on June 27, 1977, the Supreme Court of the United States rendered a decision in the Dayton case, *Dayton Board of Education* v. *Brinkman,* ..... U.S. ..... (1977). The Court is of the opinion that the litigants in the present case and the community whose attention and concern have been captured by this litigation are entitled to know whether the Dayton decision alters the law applicable to this proceeding. The Court will hear the arguments of the litigants concerning this pronouncement of the Supreme Court when the matter is properly before the Court. In the meantime, I have reached the reluctant

conclusion that the position taken by some litigants and counsel construing the Dayton decision as having a far-reaching impact upon this litigation should be addressed.

In the Dayton case, the Supreme Court held that the United States Court of Appeals for the Sixth Circuit erred when, without reversing the trial court's finding that the Dayton Board of Education had engaged in a "three part cumulative violation," the Court of Appeals required the Dayton trial court to impose a systemwide, statistical busing remedy. According to the Supreme Court, "instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope." *Brinkman*, ... U.S. at .....

The Dayton litigation is not over. The Supreme Court sent the case back to the trial court with instructions that it make "more specific findings" concerning the Dayton plaintiffs' contention that the Board of Education there had engaged in numerous constitutional violations, not just three. ..... U.S. at ..... The Supreme Court also instructed the trial court to leave the present desegregation plan in operation for the coming school year, "subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion." .....U.S. at .....

The Dayton decision stands for the proposition that an equitable remedy should not go beyond the scope of the wrong which it purports to redress. The Supreme Court stated in the Dayton decision that if defendant school officials are found to have engaged in violations of the Constitution, the lower courts "must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently

constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." According to the Supreme Court, "The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Dayton Board of Education* v. *Brinkman*, ... U.S. at ..... In my view, the hope that the Dayton case would provide new and clear instructions for trial courts has not been realized. I do not view these principles as any different from those under which the litigants were operating when this case was tried. Six years ago, the Supreme Court stated unanimously in a school desegregation case that "the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). See also the June 27, 1977, decision in the Detroit case, *Milliken* v. *Bradley*, ...U.S. ....., ... (1977), where the Supreme Court referred to the "well-settled principle that the nature and scope of the remedy is to be determined by the violation."

On June 29, 1977, two days after the Dayton decision was rendered, the Supreme Court, with three justices dissenting, vacated and remanded the decisions of the courts of appeal in school desegregation cases involving Omaha, Nebraska, *United States* v. *School District of Omaha*, 541 F.2d 708 (8th Cir. 1976) and Milwaukee, Wisconsin, *Armstrong* v. *Brennan*, 539 F.2d 625 (7th Cir. 1976). In two brief *per curiam* opinions, the Supreme Court cited *Washington* v. *Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, ... U.S. ..... (1977), and *Dayton Board of Education* v. *Brinkman*, ... U.S. ..... (1977). The Seventh and Eighth Circuit Courts of Appeal, and perhaps ultimately

the Supreme Court, will decide whether the cases cited by the Supreme Court have any impact upon the Omaha and Milwaukee litigation.

In the instant case there should be no confusion concerning the scope of defendants' liability. The Court specifically found in the March 8 opinion that "liability in this case concerns the Columbus school district as a whole." 429 F. Supp. at 266. The Court found that the Columbus Public Schools were officially segregated by race in 1954 when the Supreme Court decided *Brown* v. *Board of Education*, 347 U.S. 483, and further found that the Columbus Board of Education never actively set out to dismantle this dual system. 429 F. Supp. at 236, 260. Additionally, the Court discussed in detail a variety of post-1954 Board decisions and practices, such as creating and maintaining optional attendance zones and discontiguous attendance areas and choosing sites for new schools which had the natural, foreseeable and anticipated effect of enhancing rather than mitigating the racially separate schools which were purposefully established by the Board prior to 1954. 429 F. Supp. at 236-251. The Court also noted both recent and historical complaints to the Board by various segments of the Columbus community concerning both overtly segregative actions and lost integrative opportunities. 429 F. Supp. at 255-57. On this record, the Court held that "it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion." 429 F. Supp. at 261. Viewing the Court's March 8 findings in their totality, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers. These were not the facts of the Dayton case.

Systemwide liability is the law of this case pending review by the appellate courts. 429 F. Supp. at 266. Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which defendants owe no responsibility. This they did not do, 429 F. Supp. at 260.

The Court will certainly permit the defendant Columbus Board to submit any plan that amounts to a good faith effort to comply with the Court's March 8, 1977, order and the law of the United States. Upon reception of the plan it will be carefully considered.[1] This defendant is cautioned, however, that the Court has no real interest in any remedy plan which is more sweeping than necessary to correct the constitutional wrongs plaintiffs have suffered. Nor will the Court order implementation of a plan which fails to take into account the systemwide nature of the liability of the defendants. As I stated in the March 8 opinion, "The remedy should provide black school children with the *Brown I* promise of an integrated education, and

[1]The Court notes that the defendant Columbus Board's motion for leave to file an amended plan was filed late in the afternoon July 1, 1977. On Tuesday, July 5, the Court began to draft this order. Obviously, it was necessary that the motion be acted on promptly, since hearings concerning remedial plans are to begin July 11. If the hearings are to be productive and beneficial, it is important that all litigants and the community not misunderstand the scope of the March 8 findings. Late in the afternoon of July 6 the Columbus defendants caused to be filed "a proposed amendment to the involuntary aspect of the pupil assignment component section of the desegregation plan of the Columbus Board of Education filed June 10, 1977." As of this day the Court has not had the opportunity to consider its merits. Nevertheless, it remains important that this order be entered so the Court's perception of the necessary extent of an appropriate remedial action not be the subject of needless uncertainty.

should at the same time take into account the scope and effect of the actions and omissions upon which the finding of liability is premised." 429 F. Supp. at 267.

The motion of defendant Columbus Board of Education for leave to amend its proposed desegregation plan is GRANTED.

ROBERT M. DUNCAN

Robert M. Duncan, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

Gary L. Penick, et al., *Plaintiffs,* v. Columbus Board of Education, et al., *Defendants.*	Case No. C-2-73-248

ORDER

[Filed July 29, 1977]

The Court is required to determine whether either of the proposed remedy plans submitted by defendants remedies the constitutional ills the Court found and set forth in the March 8, 1977, opinion and order, *Penick* v. *Columbus Board of Education*, 429 F. Supp. 229 (S.D. Ohio 1977). In preparing an order to perform this duty, the Court has again attempted to set forth clearly both its rulings and the reasons for them. Since March 8, school officials, the litigants, counsel, the community, and the Court have had this case and its far-reaching and dynamic importance at or near the top of their lists of concerns. It is extremely important that all concerned make the effort to become adequately informed about the remedy phase of this case.

By now it is well known that on June 27, 1977, the United States Supreme Court decided the case, *Dayton Board of Education* v. *Brinkman*, ... U.S. ..... (1977). Defendants moved the Court to re-examine its liability

findings and to adjust any remedy order in light of the Dayton case. By an order dated July 7, 1977, and in overruling motions made in Court, the Court has indicated disagreement with defendants regarding the precedential impact of the recent Dayton decision. There is no need again to repeat what it stated in the July 7 order; suffice it to say that the Court on March 8, 1977, concluded that the entire Columbus Public School System was unconstitutionally and intentionally segregated. The law requires, then, that the remedy have the hope of desegregating the entire system. I am convinced that defendants' opposition to the Court's position is good faith opposition, but the Court says, also in good faith, that its position is to be complied with so long as it remains the law.

In the thinking of many citizens, desegregation of our schools is not worth the trouble of doing it. Some sincerely believe that a remedy for constitutional wrongs, in such a case as this, also abrogates constitutional rights. Arriving at such conclusions requires the rewriting of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and cases that followed, *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The United States Court of Appeals for the Sixth Circuit has not retreated from adherence to the letter and spirit of those landmark Supreme Court determinations, as is evidenced by its July 26, 1977, opinion in *NAACP* v. *Lansing Board of Education*, ... F.2d ..... (1977), and neither will this Court.

I. DEFENDANTS' PROPOSED REMEDY PLANS

After four days of hearings and after examination of written comments of counsel, the Court believes that neither the plan submitted by the Columbus defendants nor the plan submitted by the State defendants should be

ordered implemented in its entirety. The Court has examined these plans to determine whether they "achieve the greatest possible degree of actual desegregation," which is the test employed by the Supreme Court in cases such as this, *Swann, supra*, 402 U.S. at 26:

> The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.

For the reasons set forth in this section, the Court holds that the Columbus Board's amended and original submissions would not sufficiently desegregate the Columbus Public Schools. The Court further holds that although the State Board's submission represents a reasoned and gifted effort and passes constitutional scrutiny, it nevertheless presents problems in the area of pupil reassignments and in the area of organizational changes in the schools.

(a) July 8, 1977, Amended Plan of the Columbus Board

In response to the March 8 order of this Court, the Columbus Board of Education named a desegregation planning committee. That committee's first presentation to the Board was made in May 1977 and contemplated a median in each Columbus school of 32% black students. (32.9% of the students attending Columbus Public Schools are non-white.) Although a minority of Board members

preferred the 32% presentation and later submitted it to the Court as a "minority recommendation," the 32% presentation was rejected by a majority of the Board; after further direction from the Board, the planning committee developed the June 10, 1977, plan which used a median figure of 39% black students and left 22 one-race schools unaffected. After the Dayton decision was announced, the Columbus Board revised its original submission by filing an amended plan on July 8, 1977.

The July 8, 1977, amendments are the Columbus Board's response to the June 27 Dayton decision. The amendments highlight the disparity between the defendants' reading of the current requirements of the law and the Court's reading. The amended plan falls far short of providing a reasonable means of remedying the systemwide ills. Obviously, if one perceives the law as applied to the March 8 findings of fact and conclusions of law as requiring a rather narrow remedy which has as its purpose only the desegregation of 11 identifiably black schools, the system's ills, then yet unabated, will continue to cause distress to those whose *Brown I* promise will remain unfulfilled.

The July 8 amended plan lists 123 elementary schools in the system. The proposed pairings and clusterings contemplate closing 5 of these schools; using 1976-77 enrollments (without Columbus Plan) and using 32.5% ± 15%, 3 of these 5 are presently racially-identifiably white, 1 is black, and the fifth (Heimandale) is balanced (30.7%). Another 19 schools, now racially-identifiable, would be balanced under the amended plan; 7 of these are now identifiably black, while 12 are presently white. Two other schools would be affected: Second Avenue, already racially balanced at 18% black, would be paired with Garfield and with Hubbard's student body (Hubbard is scheduled for closing) and would become 34.6% black, while Watkins, presently 83.5% black, would receive 13% of Moler's enrollment and would become 76.6% black.

All told, then, 5 elementaries would be closed; 19 elementaries presently out of balance would be balanced; 1 elementary now balanced would have its black enrollment increased but would remain within the unidentifiable range; 1 elementary now identifiably black would have its black enrollment decreased but would remain identifiably black; 97 elementaries would remain unchanged.

Of the 97 unaffected elementary schools, under the 1976-77 enrollment figures (without Columbus Plan) and using 32.5% ± 15%, 53 would be identifiably white, 28 would be black, and 16 would be balanced. There would actually be 29 black elementary schools under the amended plan, because Watkins Elementary, although one of the 26 schools affected by the proposal, would remain identifiably black under the plan.

The July 8 plan affects only 2 junior high schools: Barrett, which is presently identifiably white, and Champion, now black. Under the amended plan, Barrett would become 41.6% black, and Champion 39.9% black. Of the remaining 24 junior high schools, 10 would remain identifiably white, 7 would be black, and 7 would be balanced.

There are 4 junior-senior high schools and 14 senior high schools (excluding Ft. Hayes and Adult High School), none of which would be affected by the July 8 submission. Two of the junior-senior schools would remain black and two would remain white. Eight of the high schools would remain white, 3 black, and 3 balanced.

Thus, without Columbus Plan transfers, using 1976-77 enrollment data, and applying a 32.5% ± 15% range, 29 elementary schools would remain identifiably black under the Columbus defendants' amended submission, 29 would remain identifiably black, 53 would remain white, 17 would

remain in racial balance, 19 would be brought into racial balance, and 5 would be closed. Seven junior highs would remain black, 10 would remain white, 7 would remain balanced, and 2 would be brought into balance. Two junior-senior high schools would remain black, and 2 white. Three senior high schools would remain black, 8 white and 3 balanced. Totals for all schools under this plan: 41 would remain identifiably black, 73 would remain white, 27 would remain balanced, 21 would be brought into racial balance, and 5 would be closed.

Viewing the Dayton case as they do, the Columbus defendants did not shoulder the burden of showing that the amended plan's remaining one-race schools are not the result of present or past discriminatory action on their part as required by *Swann, supra,* 402 U.S. at 26. The pupil reassignment component of the July 8 amended plan, then, is constitutionally unacceptable.

(b) **June 10, 1977, Original Plan of the Columbus Board**

Although the Columbus Board's submission is in fact the June 10 plan as amended on July 8, the litigants produced evidence and argument about the acceptability of the June 10 plan before its amendment, and for that reason the Court will speak to the plan in its earlier form.

The Columbus Board's June 10, 1977, submission (without amendment) leaves 22 schools racially identifiable. The brief of counsel for the Columbus defendants calls the Court's attention to the fact that there is no constitutional requirement that all schools be racially balanced. I am mindful that the order of March 8 related that "I believe that it may be possible to eradicate unlawful segregation from the Columbus school system root and branch without embarking upon a scheme which envisions that every school in the district should have the same

student racial breakdown as does the school district as a whole." 429 F. Supp. at 266.

Citing cases from other jurisdictions, counsel's brief also accurately reminds the Court that under certain circumstances, a remedy plan that leaves a number of one-race schools may not violate the Constitution. However, adequate justification for the retention of one-race schools must be supplied by the defendants. They have not done so. Defendant Dr. Joseph Davis explained the process by which the June 10 plan was developed:

> Q. In determining what schools would be left out of the plan, what approach was taken by you and the staff?
>
> A. We started with the elementary schools, Mr. Lucas, and originally, employing concept maps as opposed to maps representing concrete specific pairings or clusterings.
>
> We demonstrated what could be accomplished through boundary changes and contiguous pairings and clusterings at the elementary level to eliminate racially identifiable schools.
>
> That left us, as I recall, sir, we had 37 racially identifiable black schools to be rendered racially neutral.
>
> . . .
>
> Going through the concept maps, we started to render racially identifiable black schools neutral through contiguous attendance area, boundary changes, pairings and clusterings, and we got that number down from 37 to 24, as I recall.
>
> Then, as I testified this morning, we — with the assistance of counsel, the planning team and counsel, identified those elementary schools that were specifically cited in the opinion and order of March 8, and in rendering those — and I think

> they were 11 in number — in rendering those 11 racially neutral, it was necessary to employ some noncontiguous clustering, pairing. That reduced the number to 13.
>
> We were trying to keep transportation at a minimum. Minimum in distance, minimum in time in transit. As we went through this process, we eventually eliminated the remaining 13 racially identifiable black schools through pairings and clusterings with what was in general or maybe what was wholly true, the closest racially identifiable white schools and neutral schools, which left us with some racially identifiable white schools that did not need to be involved in pairing or clustering to eliminate all racially identifiable black schools.
>
> It was a process of moving out — kind of a ripple effect — moving out in concentric circles, roughly speaking.

One of the primary reasons which led the Columbus Board to reject the 32% presentation of its staff, discussed below, and to adopt the June 10 plan instead, was a concern that the 32% presentation would require students to be transported longer distances and therefore would require more time en route. Columbus defendants' Exhibit S, reproduced as an appendix to this opinion, indicates the differences in time and distance students would be required to travel under the May 1977 32% presentation and under the June 1977 39% plan.

The Court has admitted evidence of the planning efforts engaged in by the Columbus defendants' staff. The Court recognizes its obligation to accept a reasonable and effective board proposal for pupil reassignments if such a proposal is submitted. In order to determine the reasonableness of any proposal it is necessary to inspect alternatives. This procedure has allowed the Court to test the defendants' submitted plans by examining the 32% presentation as another approach to the organization of a remedy. This sort of analysis is especially relevant since the same experienced staff persons prepared all of the Columbus defendants' remedy presentations.

The 32% presentation would desegregate all schools, would avoid claims that some but not all share the burden of a remedy, and would not leave 22 school areas to which white flight may be precipitated. Although the 32% presentation may require somewhat longer transportation than the June 10 plan, viewed in context this does not provide a basis to justify the continuing existence of the 22 one-race schools. When compared to the June 10 plan as submitted, the 32% presentation apparently requires the transportation of fewer students and may well be less expensive even though distance transported is slightly greater. No witness testified that the transportation under the first presentation (32%) would be detrimental to health or safety, or to the educational process.

After scrutinizing the basis for leaving 22 white schools under the June 10 plan, the Court finds that there has been no showing by defendants that the reasons for this aspect of this plan are genuinely non-discriminatory. The comparatively minor savings of travel time which the June 10 plan would allow do not justify retention of 22 white schools and acceptance of the problems such schools create as well as leave unsolved. The 32% presentation demonstrates that the June 10 plan's proposed omission of 22 identifiably white elementary schools from the remedy is not required by sound logistical or educational concerns. The pupil reassignment component of the original June 10 plan is constitutionally unacceptable.

(c) **State Board's Plan**

After hearing the testimony of the state defendants' expert witness, Dr. William Gordon, the Court finds that the pupil reassignment aspect does provide a plan that could be implemented which would provide a lawful remedy for plaintiffs. The state plan would leave 3 elementary schools and 1 high school on the western edge of the city racially identifiable. As I understand it, the decision to leave these 4 schools unaffected by the State Board's plan was based upon sound feasibility concerns which the planners encountered once they decided to structure a regional-based plan using high schools as a starting point. I hold the State Board's plan to be constitutional.

(d) **Conclusion**

In sum the Court rejects the pupil reassignment components of both the Columbus Board's amended July 8 plan and its original June 10 plan. However, the Court does note that these defendants have spent months of work (thousands of manhours) in responding to the March 8 order. The work of Columbus defendants' staff persons in pairing, clustering, boundary adjusting and establishing feeder patterns shows the strength of their efforts in certain areas.

The Court finds that the State Board's plan has the capability for student reassignments that will pass muster. The plan also may fairly be said to have some faults. In the effort to pair, cluster and alter boundaries and feeder patterns so that children from the same areas would remain together throughout their school experience, the State plan calls for some school buildings containing only two grades. In addition, the fashion in which some schools are related apparently calls for more transportation than

would be necessary under the 32% presentation and the Columbus defendants' plans.

The Columbus defendants' first staff presentation (32%) has the strengths mentioned hereinabove, and also passes muster. However, it has only been considered as a look at another alternative for the solution of the problem the Court faces. The presentation seemingly has not been thoroughly considered and documented by the total planning group. Although its numerical face is satisfactory, its feasibility is not a matter about which the Court can be certain.

II. PLANNING AND IMPLEMENTATION

After careful deliberations concerning both the pressing need for a remedy in this case and the time and logistical constraints facing the defendants, the Court has settled upon a two-stage implementation framework. A third stage, consisting of monitoring, may be necessary at some point in the future.

Phase I begins the day this order is filed. Renewed planning efforts governed by the principles and the timeframe set out below shall occur during Phase I. Implementation of certain preparatory programs detailed below shall also occur during this period; many of these Phase I programs will be continued during Phase II.

Phase II shall consist of implementation of pupil reassignments plus other necessary desegregation plan components. Reassignments of elementary pupils will commence when the schools are reopened after January 1, 1978, while reassignments of secondary pupils will commence when the schools open in the fall of 1978.

This phasing of implementation represents a needed compromise between the Court's earlier-stated goal of

September 1977 implementation and the Columbus Board's and State Board's proposals that implementation be phased over a period of two or three years.

(a) **Phase I — Preparatory Efforts**

To assure that Phase II of the remedy plan is implemented smoothly and effectively, it is necessary for defendants to take certain preparatory steps now and during the 1977-78 school year. In both their June 10 submission and their July 8 amended plan, the Columbus defendants recognize the need to provide students, parents, school personnel and the community at large with accurate information concerning the precise ramifications of the remedy phase of this litigation. These defendants also recognize the need to involve these various groups in the implementation of the remedy phase. The Court wholeheartedly agrees with this approach, and commends the Columbus defendants for the significant steps they have already taken to provide interested persons with such information and to encourage active participation and involvement by all concerned persons.

I recognize that it is difficult to disseminate information and encourage involvement when a precise remedy plan has yet to be approved by the Court. Yet, it is better in my judgment to work in an uncertain but developing framework than to approve a plan which may not be the best one available. Until the Court has approved a specific plan for Phase II, then, it is necessary during Phase I for all defendants to do the best they can to prepare the school system and those it serves for implementation.

The Court will set forth in the succeeding paragraphs certain programs which defendants are hereby required to implement during Phase I. Most of these programs were

included in the Columbus defendants' June 10 submission, and in most cases, no amendments to or deletions of these programs were made by the Columbus defendants' July 8 amended submissions. Each of these programs is in my judgment necessary to assure desegregation of the Columbus Public Schools. Implementation of certain programs or parts of programs may not be feasible until the details of Phase II become known; defendants under such circumstances will do what they can now to ease such implementation once remedy details are revealed.

During Phase I the Columbus defendants shall continue to strive for rumor control and shall continue to provide accurate information to all concerned persons in the community. Defendants will make full use of the expertise and facilities of the Public Information Office of the Columbus Public Schools. The "Community Orientation and Information Services" component of the Columbus Board's June 10 submission, at pages 188-193, includes public information, parent/student participation and community involvement aspects and represents an excellent initial framework.

It is also necessary during Phase I for the Columbus defendants to continue their efforts to orient students and professional staff to the desegregation process, as these defendants proposed at pages 167-70 and 182-85 of their June 10 submission. The Columbus defendants shall prepare and implement in every elementary school during the first semester of the 1977-78 school year curricular modifications designed to explain the desegregation process to these students and to answer their questions and concerns. During the 1977-78 school year, these defendants shall also take steps to prepare secondary school students for desegregation involvement, which steps may include

those set out at pages 167-170 of their June 10 submission. In both the elementary and secondary setting, orientation of staff as proposed at pages 184-85 of that submission is of course of paramount importance.

During Phase I the Columbus defendants shall also prepare and begin to implement a reading development program based upon need and "multi-cultural" curricular modifications along the lines they suggested at pages 165-66 and 171-72 of their June 10 submission. Other modifications of curriculum may well be required in the future to assure successful desegregation of the school district, as the Columbus defendants suggested at pages 170-71 of their June 10 submission.

Although I have referred to specific pages of the June 10 submission, it is not my intention to incorporate every word and phrase of each of these pages as part of the Phase I order. Instead, it is my intention to point out the areas which need Phase I attention, and to leave the Columbus defendants substantial discretion concerning the manner and scope of implementation of programs in this area. On or before August 17, 1977, these defendants shall inform the Court, and plaintiffs and the intervening defendants of the specific steps they intend to take to implement this part of this Phase I order. Should it appear that Phase I implementation is faltering, the Court will enter more specific orders than the present one.

(b) Phase I — Planning Efforts

There is work that remains to be done regarding pupil reassignment. The evidence illustrates that each of the remedy proposals regarding pupil reassignment discussed above has strengths and weaknesses. There is a need to examine all of them critically in an attempt to produce the

superior method of pupil reassignment. In doing this school officials (local and state) should take the lead in the work that remains to be done. Without intent to diminish the responsibility of the State defendants, the Court believes that the Columbus defendants, who are most familiar with the system and have a staff of persons who have worked on the plans submitted, have the capability to spearhead the effort to produce a pupil reassignment concept that will draw together the strengths of all the presentations and also comply with the Court's order that the entire system be desegregated.

Some of the defendants have made it abundantly clear that they firmly oppose the thrust of the Court's orders regarding the extent of pupil reassignment required by law. The Court urges these defendants, in the interest of the students, to fashion a solution which makes the best of what some perceive as an unfortunate situation. The Court hopes that the pupil reassignment plan will reflect a spirit of progress, provide evidence that open access to equal and lawful educational opportunity can be achieved, and ultimately become the basis for achieving harmony and trust within the community.

It is ordered that the following principles be observed in promulgating the *pupil reassignment* component of the remedy plan:

1. The plan must be capable of desegregating the entire Columbus school system. Either the State Board's plan or the 32% presentation could be used as a starting point, because pupil reassignments under these plans meet Court requirements. If defendants choose another alternative as a starting point, any resulting plan must legally desegregate the entire Columbus school system under the principles set out in this order.

2. The planners may use any techniques for pairing, clustering, feeder patterns, boundary changes, attendance zones, or others that they choose to accomplish the plan's objective.

3. The pupil reassignment of elementary (grades 1-6) school children is to be implemented when the schools reopen after January 1, 1978, and the pupil reassignment of secondary (grades 7-12) school children is to be implemented when schools open after September 1, 1978. Kindergarten students shall not be included in pupil reassignments.

4. The plan shall refer to the survey of transportation alternatives which defendants prepare as required hereinbelow, and shall indicate which transportation methods defendants propose to use and the estimated costs thereof.

5. Alternative schools and career centers in existence at the close of the 1976-77 school year may be maintained so long as they remain in racial balance. Columbus Plan transfers to such schools and centers may continue. Columbus Plan transfers to other than alternative schools or career centers (transfers solely to improve racial balance) shall not be included in the plan. Creation of new alternative schools or career centers may occur under the conditions set forth hereinbelow.

6. The plan produced shall be submitted to the Court on or before August 24, 1977.

The Court, believing that the Columbus and State defendants are best equipped to produce a plan according to these principles, orders the Columbus and State defendants to notify the Court on or before August 3, 1977, as to whether or not they will cooperate with each other and the Court in the preparation of the pupil reassignment plan according to the principles set forth above. The

Court, the special master, and the Court's staff are available for help in any reasonable manner the defendants may request. Moreover, the Court encourages the State defendants actively to contribute their expertise and other resources, and to cooperate with the Columbus defendants in this planning endeavor.

In the event the Columbus defendants do not notify the Court that they accept their obligation to prepare a pupil reassignment plan, this Court will then prepare such a plan. Obviously, such is the least desirable alternative, but the Court is firm in its intent to provide plaintiffs a remedy.

Serious questions arose at the remedy hearings concerning the transportation components of defendants' proposed remedial plans. These questions concern the number of buses required under the plans and certain costly components such as two-way radios on each bus, security personnel and paid monitors. For example, Dr. William M. Gordon compared the Columbus Board's plan with the State Board's plan:

> On the next page, we compared the transportation costs, and again, I realize these are subject to some question, but we were concerned that we were so far off in our figures and that is what precipitated the whole document. So we noted that the City was buying 423 buses and only transporting 39,000 youngsters. We were buying 329 buses and transporting 37,000 youngsters and we were curious as to why the differences.

The Court finds that an intensive and detailed analysis of transportation requirements and alternatives is required to assist in achieving systemwide desegregation.

It is therefore necessary for the Columbus Board and the State Board to take immediate steps to prepare for

the transportation that will be required, whether or not defendants choose to prepare a new plan under the foregoing guidelines. The Columbus and State Boards shall forthwith investigate every reasonable avenue of obtaining transportation sufficient to implement systemwide desegregation. They shall investigate and document the availability or unavailability of school buses by purchase and by lease. They shall investigate and document the availability or unavailability of workable arrangements with the Central Ohio Transit Authority (COTA). They shall investigate and document the feasibility of several combinations of transportation including those referred to above as well as the feasibility of providing passes to secondary level students allowing them to use public transportation. Applying the criterion of healthful and safe transit, they shall explore thoroughly the need for monitors and other security measures such as special security officers and two-way radio systems. The transportation component may be based upon the time/distance criteria on page 136 of "Response of the Columbus Public School District to a Federal District Court Desegregation Order," June 10, 1977. The State defendants may be in a good position to assume a leadership role in the chore of investigating the availability of safe transportation. The Columbus Board and the State Board, separately or jointly, shall file with the Court on or before August 24, 1977, a detailed report of available transportation alternatives.

The Court is aware of the requirements of the Emergency School Aid Act, 20 U.S.C. § 1601, *et seq.* Nothing contained in this order shall require that the new plan be drawn in a fashion which would disqualify the defendants from eligibility for such funding.

(c) Faculty and Staff

Considerable evidence was introduced during the remedy hearings in this case relating to faculty and staff assignments. The Court has given careful consideration to all of this evidence together with a review of this Court's findings concerning faculty and staff made in the liability phase of this case. Several general conclusions can be drawn from this examination.

The present racial mix of faculty and staff in the Columbus Public School System is, at best, delicate. In the March 8 opinion, the Court noted that "the Columbus defendants were not at the time of trial 100% in conformity with the [Ohio Civil Rights Commission conciliation] agreement." 429 F. Supp. at 238. Although the Court did not find the noncompliance with the conciliation agreement to be a substantial factor, the Court discussed, and in part relied upon, the history of faculty racial segregation in making the liability findings in this case. The evidence produced at the present hearings indicates that a single teacher may often be the difference between compliance and noncompliance with the racial balance requirements of the conciliation agreement. The plaintiffs have argued that the median percentage of black faculty and staff agreed upon in the conciliation agreement is not appropriate. A reconsideration of the median percentage, as well as the allowable range of deviation, may be necessary in the future. In the March 8 opinion and order, the Court also noted that "the assignment of non-professional staff is racially suspect." 429 F. Supp. at 240 n.2.

It has become apparent that the implementation of a remedy in this case will necessarily impact upon the assignments of faculty and staff within the school system, and may require some faculty and staff adjustments. All of

the pupil reassignment plans presented thus far involve the restructuring of grade levels in various schools and the closing of a few schools. These changes will require that certain faculty and staff adjustments and reassignments be made.

The remedial powers of a court of equity must be exercised in a fair and reasonable manner. Although the Court cannot order the implementation of a desegregation plan which exceeds the scope of the violations found, the Court has broad and flexible equity powers to remedy the consequences of the constitutional violations found to exist. As the Supreme Court stated in *Milliken* v. *Bradley*, ... U.S. ....., ..., 45 U.S.L.W. 4873, 4876 (1977) (*Milliken II*):

> *Montgomery County* [*United States* v. *Montgomery County Board of Education*, 395 U.S 225 (1969)] therefore stands firmly for the proposition that matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation. Similarly, in *Swann* we reaffirmed the principle laid down in *Green* v. *County School Board, supra*, that "existing policy and practice with respect to faculty, staff, transportation, extracurricular activities and facilities were among the most important indicia of a segregated system." 402 U.S., at 18. In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.

In *Montgomery County* the Supreme Court stated that faculty and staff desegregation is "a goal we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." 395 U.S. 231-32. The importance of faculty and staff desegregation, and its impact upon the school system, cannot be overemphasized.

In this case, the Court has found a history of unlawful segregation in the hiring and assignment of faculty and staff. Although this segregation has been somewhat attenuated in recent years, the racial balance of faculty and staff in the Columbus schools remains delicate. The remedy plan implemented in this case must be equitable. It must not, therefore, aggravate or create some constitutional infirmities while solving others.

The duty to make the adjustments and reassignments of faculty and staff falls, in the first instance, on the defendants. In light of this Court's findings concerning faculty and staff, I do not believe that specific adjustments and reassignments are required to be included in the plan at this time. The Supreme Court has required, however, that a district court retain jurisdiction to insure that a desegregation plan is "operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved." *Raney* v. *Board of Education*, 391 U.S. 443, 449 (1968) (citations omitted). This Court's retention of jurisdiction will provide a forum where a remedy can be afforded if it is shown that court-ordered adjustments and assignments of faculty and staff are necessary for the remedy plan to operate effectively, or that the defendants have operated the remedy plan in a constitutionally impermissible fashion.

I believe that the defendants share this Court's concern relating to faculty and staff. In both the original June 10 proposal (at p. 142) and the amended July 8 proposal (at p. 45) the Columbus defendants pledge adherence to a policy of non-discriminatory hiring, and a commitment to improve the number and percentage of black professional

staff. These plans also promise the non-discriminatory assignment of administrators within the system. The position taken by the Columbus defendants in this regard is commendable. The implementation of this policy would, however, be greatly enhanced by a consideration of the excellent observations and recommendations contained in the proposal of the State defendants at pages 183-221. The Court specifically notes the recommendations made at page 196 of the State Board's proposal (portions omitted):

1. When vacancies occur in out-of-balance schools, replacements should be made with teachers who will improve the racial balance of the school. However, care must be taken not to cause an inordinate number of "beginning" teachers or "veteran" teachers.

2. Teachers in those schools [recommended for closing] should be reassigned in such a way to promote racial balance. Once again a conscious effort to maintain experience and training balances should be made.

Similar recommendations are made with respect to administrators at page 210 of the State Board's proposal. The recommendation that an "affirmative action" program be implemented with respect to the nonprofessional staff (p. 212) is also worthy of due consideration.

The Court is also aware that certain personnel decisions must include consideration of such factors as civil service regulations or collective bargaining agreements. The memorandum of agreement between the Columbus Board of Education and the Columbus Education Association appears to be a step in the right direction. The Court sincerely hopes that such efforts will continue and be expanded in the future, and that further litigation concerning faculty and staff can thereby be avoided.

(d) Alternative Schools, Career Centers, and School Closings

Both the original June 10 and amended July 8 plans submitted by the Columbus defendants continue and expand the use of alternative schools and career centers. Although the Court has found that such programs have no "probability of substantially curing the system's racial imbalance," 429 F. Supp. at 259, such programs have been found to be proper components of desegregation plans. Since the evidence in this case does not show that these programs will operate to desegregate the Columbus Public Schools, or that they are necessary for the success of a remedy plan, I do not believe that they are necessary elements of the Court-ordered remedy. In so finding, the Court in no way expresses any disapproval of the continuation and expansion of these programs. To the contrary, the Court believes that the operation of these programs along the guidelines outlined at pages 124-27 of the June 10 plan may well serve worthy educational interests. Such matters should be reserved for consideration by the local board of education. That board has determined that these programs are desirable, and the Court will neither interfere nor argue with that judgment. Although the expansion of such plans must be assigned a lower priority than the implementation of the Court-ordered remedy plan, these programs may (and hopefully will) be continued if financially feasible.

All of the submissions to date call for the closing of some schools. When a new plan is prepared by the defendants, and this plan includes school closings, the decision of which schools are to be closed will be left to the defendants. The considerations outlined at pages 13-14 of the June 10 plan appear to be entirely appropriate. The

Court may, however, review the proposed closings to insure that they do not negatively impact the effectiveness of the plan or its implementation.

III. CONCLUSION

Well knowing that many of the defendants and many in the Columbus community as a whole strongly object to implementation of any remedy plan in this case, the Court nevertheless feels bound to order a remedy implemented. As I read the law, including the Dayton decision, further delay in this case will only postpone the inevitable and fuel the hopes of those who hold that eventually this case and its ramifications will simply go away. In the past, the Supreme Court has indicated that once liability in a school desegregation case has been established, lower courts must order a timely remedy, without waiting until appeals have been exhausted. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). It is this mandate with which the defendants and this Court must comply.

To summarize, the Columbus and State Boards of Education are required to submit an August 3, 1977, indication of whether they will prepare the required new remedy plan and an August 24, 1977, report concerning transportation alternatives. The Columbus Board is also required to submit an August 17, 1977, report concerning Phase I preparatory efforts. If the boards decide to prepare a new plan, it shall be submitted on or before August 24, 1977.

While implementation of a remedy occurs here, I believe defendants should have an opportunity to make their arguments in the Court of Appeals. In the event the appellate courts do not agree with my reading of the applicable law, this Court will be quick to follow any requirements

they may provide. I hereby certify that this order and the memorandum and order filed on July 7, 1977, concerning the Dayton case, involve controlling questions of law as to which there are substantial grounds for difference of opinion and further certify that immediate appellate review of these decisions may materially advance the ultimate termination of this litigation.

It is so ORDERED.

ROBERT M. DUNCAN

Robert M. Duncan, Judge
United States District Court

DISTANCE TRANSPORTED
ELEMENTARY SCHOOLS

Distance Transported*	32% Presentation	39% Presentation
Less than 2 miles	7	11
2-3 miles	15	14
3-4 miles	2	18
4-5 miles	5	30
5-6 miles	8	7
6-7 miles	20	
7-8 miles	15	
8-9 miles	6	
MEDIAN	6-7 Miles	3-4 Miles
RANGE	2-9 Miles	2-6 Miles

*Distances are calculated on a school site to school site basis with a factor of 1 mile = 1.2 miles.

DISTANCE TRANSPORTED
JUNIOR HIGH SCHOOLS

Distance Transported*	32% Presentation	39% Presentation
Less than 2 miles	32	31
2-3 miles	10	14
3-4 miles	3	6
4-5 miles	3	12
5-6 miles	5	9
6-7 miles	9	1
7-8 miles	3	1
8-9 miles	4	
MEDIAN	2-3 Miles	2-3 Miles
RANGE	2-9 Miles	2-8 Miles

*Distances are calculated on a school site to school site basis with a factor of 1 mile = 1.2 miles.

DISTANCE TRANSPORTED
SENIOR HIGH SCHOOLS

Distance Transported*	32% Presentation	39% Presentation
Less than 2 miles	15	19
2-3 miles	23	29
3-4 miles	8	11
4-5 miles	0	4
5-6 miles	7	3
6-7 miles	10	1
7-8 miles	4	4
8-9 miles	2	1
MEDIAN	2-3 Miles	2-3 Miles
RANGE	2-9 Miles	2-9 Miles

*Distances are calculated on a school site to school site basis with a factor of 1 mile = 1.2 miles.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gary L. Penick, et al.,
Plaintiffs,
v.
Columbus Board of Education, et al.,
Defendants.

Case No. C-2-73-248

MEMORANDUM AND ORDER

[Filed October 4, 1977]

This matter is before the Court for consideration of the proposed desegregation remedy plan filed by defendants Columbus Board of Education and its superintendent on August 31, 1977.[1] The Court's first inquiry is whether the proposed plan promises to remedy the constitutional violations outlined in this Court's opinion and order, *Penick v. Columbus Board of Education*, 429 F. Supp. 229 (S.D. Ohio 1977), in accordance with the guidelines set forth in the Court's order of July 29, 1977. For the reasons set forth herein the Court finds the defendants' plan to be acceptable.

The Court also has before it a motion of the Columbus defendants to stay the implementation of *any* remedy in this action pending resolution of the appeals now pending before the United States Court of Appeals for the Sixth

[1]The "August 31, 1977, submission" as used herein shall mean the August 31, 1977, submission as revised on September 26, 1977.

Circuit. The Court does not find this motion to be well taken for the reasons discussed below.

The Columbus defendants' August 31 submission contains a recommendation and request that the implementation of the elementary school reassignment component of the plan be delayed from January 1978 (as previously ordered by the Court on July 29, 1977) to September 1978. Pursuant to an order of September 16, 1977, the Court held an evidentiary hearing on this question. This order contains the Court's basis for acceding to the Columbus defendants' request.

I

Pursuant to the Court's order of July 29, 1977, the Columbus defendants caused to be filed on August 31, 1977, a proposed plan for the desegregation of the Columbus Public Schools. On the same day, August 31, defendants State Board of Education and State Superintendent of Public Instruction responded to the July 29 order by concurring in the pupil reassignment plan submitted by the Columbus defendants. On September 13, 1977, the original and intervening plaintiffs responded to the August 31 submission as follows (in part):

> . . . the defendants have, in plaintiffs' opinion, adequately provided a constitutionally appropriate remedy to the past pupil assignment violations found by this Honorable Court.
>
> Although the plaintiffs, by and through their counsel, may have selected different pairings and/or made assignments other than those identified by the defendants, these differences would be based upon policy and technical considerations not going to the legal question of the constitutional effectiveness . . . . [T]he defendants' submission to this Court as it pertains to pupil reassignment meets the constitutional requirements for an adequate and effective remedy.

There being no objection to the pupil reassignment aspect of the submission of the Columbus defendants, or good cause shown why it should not be approved by the Court, the pupil reassignment component of the August 31, 1977, submission of the Columbus defendants is approved and adopted.

The Court's approval of this plan is specifically made subject to modifications or amendments as the Court may approve for good cause shown. The Court is sensitive to the complexity of developing and implementing a desegregation remedy and the possibilities for error or oversight in such a process. The plaintiffs and state defendants have both noted the possible need for some refinements to the August 31 plan. Some degree of flexibility should, therefore, be provided in the event that revisions of the plan become necessary and appropriate.

The Court is aware of the interest and concern demonstrated by the community in various provisions of the defendants' plan. The primary responsibility for pupil reassignment lies with the Columbus Board of Education; however, the Court believes that, within the confines of the law, the needs and sentiments of the community should be considered. Moreover, this Court is ill-equipped to evaluate the recommendations of concerned citizens and community groups. This is especially true with respect to proposals that relate to areas which this Court has already indicated it is reluctant to enter. The Court hopes, therefore, that the Columbus defendants will continue to consider input from the community. The Court *suggests* that the Columbus Board of Education establish a timetable and procedure for hearings to receive, consider and eval-

uate proposals and comments relating to the desegregation process from parents, students, teachers, community groups and others.

The Columbus defendants may file with the Court such requests for modifications or amendments to the plan as are approved by the Board of Education, together with a memorandum setting forth the reasons for the requests and their effect on the plan. Unless otherwise ordered by the Court, all other parties may respond within fifteen (15) days after the filing of any such request. The Court will consider only those requests, if any, demonstrated to be within the letter and the spirit of the Court's July 29 order.

II

In the August 31 submission the Columbus defendants have included proposals for a variety of costly goods and services. Although many of these items may be educationally desirable in the general sense, the Court is not convinced that all are reasonably related to and necessary for the implementation of a desegregation remedy in this case.

For example, under the category of needed personnel the Columbus defendants propose to employ 40 certificated "pupil personnel specialists" at an average salary of $17,021.00 plus 17.056 per cent for fringe benefits, or $19,924.00 each, at a total annual cost of $769,960.00. The testimony at trial indicated that after reconsideration of the advisability of having monitors on each bus, the decision was made to employ personnel specialists rather than monitors. The 40 specialists would be available at certain schools to aid children in safely exiting the vehicles. Additionally, these persons would perform the function of visiting teachers. The school district currently employs

approximately 20 visiting teachers, down from a former total of around 40, the reduction having been mandated by a shrunken budget and some decline in total pupil enrollment.

Such personnel specialists listed as necessary for safe transportation are in addition to the proposals for two-way radios ($365,505.00), extra telephone service and communicative equipment ($203,300.00), and in-system security unit personnel ($94,354.00). The Court does not wish to substitute its judgment for that of the defendants and presently sees no reason to order that such personnel specialists not be hired; however, if the primary reason for the amount of salary they are to receive is compensation for service as qualified visiting teachers, it appears unreasonable to charge all of their salary expense as necessary transportation expense. The Court does not find that these and other budget items are purposefully inflated, but the Court does question the need for and amount of some of the budgeted items as necessary to be included in an order in this case.

This Court is aware of and sensitive to the financial difficulties of the present day school district. The Court is also aware that these difficulties cannot be wholly attributed to court-ordered desegregation. The expenses of desegregation are substantial enough without including budget items which arguably have no direct relationship to the desegregation process. Budget items designed to address needs which existed before the March 8, 1977, finding of liability cannot in fairness be attributed to the remedy phase of this litigation. The community should not be misled about the costs of desegregation.

Therefore, the Columbus defendants must re-examine and update the anticipated budget for all phases of the plan as approved. The revised budget shall be submitted to the Court on or before November 9, 1977.

III

The remedy which defendants have proposed in submissions ordered by the Court includes the transportation of substantial numbers of pupils. The Columbus Board of Education has moved the Court to stay the implementation of *any* remedy plan pending exhaustion of all appeals in this case, and has further adopted formal resolutions asserting that because of "safety, financial and administrative considerations" which the Board says are attendant to the acquisition and utilization of used school buses, no pupil reassignment plan should be implemented until such time as the school district can acquire new buses.

The Columbus defendants' request for a blanket stay of all further remedy activities pending appeal simply cannot be granted on the present state of the law. I have considered the four-pronged test commonly applied by courts in ruling upon motions for stay pending appeal. *Long* v. *Robinson*, 432 F.2d 977-979 (4th Cir. 1970). As the Supreme Court of the United States has stated,

> [T]he Court of Appeals should have denied *all* motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of *every* school district is to terminate duel school systems *at once* and to operate *now and hereafter* only unitary schools.

Alexander v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969) (emphasis supplied) (citations omitted). In no uncertain terms, *Alexander* requires prompt remedial action to eliminate unlawful segregation, whether appeals are pending or not. A blanket stay, for an indefinite time, of the realization by plaintiffs of their rights under the

Fourteenth Amendment to the United States Constitution is therefore inappropriate.

Defendants' request for a delay of elementary implementation is more troublesome. In the July 29 order, citing the need for "compromise between the Court's earlier-stated goal of September 1977 implementation and the Columbus Board's and State Board's proposals that implementation be phased over a period of two or three years," the Court adopted a schedule calling for elementary pupil reassignments in January 1978 and secondary pupil reassignments in September 1978. At the evidentiary hearing most recently held in this case, defendants were afforded an opportunity to show that elementary implementation during the second semester of the current school year would be unreasonable.

The Court has considered the arguments and evidence advanced by defendants concerning the claimed educational drawbacks attendant to a mid-year elementary implementation. The Court is of the opinion that any negative impact upon students' education would be negligible if a conscientious, thorough effort were made to achieve a smooth and responsible implementation.

The Columbus defendants have expressed a strong preference for purchasing new buses rather than purchasing used ones or leasing vehicles. The Court accedes to this preference as a matter of deference to a management decision of the Columbus Board of Education, but the Court cannot find on this record that used or leased vehicles are in any way detrimental to the safety of children. Any vehicle used to transport school children in Ohio must be inspected by the State Highway Patrol and certified to be safe.

The Court has doubts concerning the need for a complement of 210 additional vehicles for elementary imple-

mentation alone. The Columbus defendants' report indicates a need for 210, 65-passenger vehicles for elementary implementation in January, yet indicates a need for only 3 more such buses for combined elementary and secondary implementation in September. It would seem that a staggered starting schedule and wise use of the vehicles the Columbus Board already owns would have allowed implementation at the elementary level with substantially fewer additional vehicles.

In the July 29 order, the Court required defendants to submit detailed reports concerning the availability of new, used and leased buses. The reports which have been submitted in response to that order are in my judgment shallow, conclusory and only marginally responsive to the terms of the Court's order. Neither report seriously explores the availability of leased vehicles for a January implementation. Both reports assume, without adequate documentation, that no expedited arrangements with manufacturers and suppliers of new buses are feasible. The Court is not convinced that such vehicles are unavailable for January.[2] On the other hand, the evidence of record does not permit the conclusion that the new vehicles can

[2]A few phone calls to bus manufacturers and distributors, placed by the Special Master since the hearings, gives one the impression that the chances of obtaining approximately 200 new buses by the end of January 1978, if the bidding process were abbreviated, are much better than the defendants' reports would have one believe. Some of this optimism may, as the Columbus defendants' expert suggested, be attributable to the sellers' enthusiasm concerning a large sale. Because a prompt ruling by the Court was necessary, there was insufficient time to permit the preparation of a report by the Special Master and responses to such a report by the parties. The information gathered by the Special Master is available to the parties on request.

be available in January 1978 with the high degree of certainty needed to justify an order dependent on such availability.

The evidence presented at the latest hearings simply fails to answer many of the Court's questions. Although the plaintiffs voiced strenuous disagreement with the defendants' contentions, they failed to present evidence which the Court finds effectively rebuts the defendants' arguments. Although the sole witness called by the plaintiffs testified concerning the possible availability of aproximately 150 buses by January 31, 1978, and an additional 50 buses by the end of February (if an order was placed by September 30, 1977), the Court does not find this testimony sufficient to establish the degree of certainty necessary for this Court to proceed with a January implementation.

Even though several witnesses testified that a January implementation is *possible*, these witnesses also expressed a need for thorough and far-reaching planning and preparation. Delaying implementation from January to September would undoubtedly provide sufficient time, including the summer months, for this work to be done. A January implementation, on the other hand, remains clouded with uncertainty.

Notwithstanding my belief that a January elementary implementation is in fact still possible, I recognize that adhering to that goal would place defendants under severe time constraints. There is no question that January implementation would place a much greater administrative burden upon the staff than would September.

The principal impediment to an effective elementary implementation in January appears to be time. The lateness of the hour is perhaps in some part attributable to

the caution with which the Court has proceeded during the remedy phase of this litigation. I am acutely aware of the broad impact of this litigation upon the community as a whole, and I do not apologize for proceeding with great caution. There was no unreasonable rush to judgment in this case, and there should be no unreasonable rush to remedy.

Throughout the entire course of this litigation the Court has attempted to act as quickly as is reasonably possible being mindful that the constitutional rights which this case concerns are of the highest priority, but it should be remembered that a January elementary implementation would directly affect only a portion of the students in the Columbus Public Schools, and would affect these grade school students only for half of the school year. When balanced against a more orderly and better planned fall implementation, one which is not encumbered by so many questions and expressions of doubt, the January implementation does not in my view merit the substantial risk of getting the desegregation process off on the wrong foot.

For these reasons, the request of the Columbus defendants that the reassignment of elementary school students be delayed from January 1978 to September 1978 will be granted. The reassignment of pupils at both the elementary and secondary level shall be implemented in September 1978.

IV

In order to ensure that the planning and preparation for September 1978 pupil reassignments has commenced and will continue, the Court will require that the Columbus defendants file reports periodically with the Court detailing the progress which has been made in specific areas.

The first such report shall be filed on or before November 9, 1977, and shall address the matters set out in the order below. The Court will specify by subsequent order the reporting dates and contents of additional reports required of defendants.

The Court also believes that a monitoring body may be necessary to oversee the defendants' planning and preparation as well as the actual implementation of the remedy plan. This matter will also be addressed in a subsequent order.

CONCLUSION

The Court is constrained to add that no one should interpret the Court's deference to the Columbus defendants' request for some delay in pupil reassignment as an indication that the Court is less than totally commited to a timely remedy for plaintiffs' constitutional losses. Such is not the case. The Court has tried to articulate hereinabove that the delay is unfortunate, but that not to delay is unreasonable.

Today's decision simply is not a victory for those who believe delay a sound tactic to escape remedying constitutional rights. The remedy phase of this litigation remains the law. Therefore, there shall be no deviation whatsoever from conscientious and thorough preparation of this remedy and its complete implementation on the date prescribed.

ORDER

1. The August 31, 1977, pupil reassignment submission of the Columbus defendants is approved and shall be implemented in September 1978, with such modifications as the Court may approve for good cause shown.

2. The motion of the Columbus defendants for a stay of all further remedy proceedings pending appeal is denied.

3. The request of the Columbus defendants for a delay of implementation of elementary student reassignments until September 1978 is granted. Pupil reassignments for elementary and secondary schools shall commence in September 1978. Phase I preparatory efforts discussed in the July 29, 1977, order of this Court shall continue for both elementary and secondary students.

4. The Columbus defendants shall re-examine their anticipated budget for all phases of the desegregation remedy and shall prepare a fully itemized anticipated budget.

5. On or before October 19, 1977, the Columbus defendants shall commence the bidding process under Ohio law for the acquisition of new school buses and related equipment necessary for a September 1978 implementation, shall notify the Court of the commencement of the process, and shall tender a schedule which details each of the major steps of that process and indicates the expected date for completion of each step.

The Columbus and State defendants shall file a written report with the Court on or before Wednesday, November 9, 1977. Such filing shall include:

(a) a report of the re-examination of the anticipated budget ordered herein;

(b) a detailed progress report on the implementation of Phase I and the defendants' proposal for Phase I efforts during the second semester of the 1977-78 school year;

(c) notification that the bidding process for the acquisition of vehicles and related transportation equipment has commenced, and the schedule and calendar for such process ordered hereinabove;

(d) a progress report on the planning for specific pupil reassignments, employment and training of necessary personnel, reassignment of teaching and administrative staff, and needed relocation and alteration of physical facilities. This report shall include a proposed timetable for the completion of each such activity.

It is so ORDERED.

ROBERT M. DUNCAN

Robert M. Duncan, Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gary L. Penick, et al.,
Plaintiffs,
v.
Columbus Board of Education, et al.,
Defendants.

Civil Action
File No. C-2-73-248
JUDGMENT
[Filed
October 7, 1977]

This action came on for consideration before the Court, Honorable Robert M. Duncan, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED THAT 1. The August 31, 1977, pupil reassignment submission of the Columbus defendants is approved and shall be implemented in September 1978, with such modifications as the Court may approve for good cause shown. 2. The motion of the Columbus defendants for a stay of all further remedy proceedings pending appeal is denied. 3. The request of the Columbus defendants for a delay of implementation of elementary student reassignment until September 1978 is granted. Pupil reassignments for elementary and secondary schools shall commence in September 1978. Phase I preparatory efforts discussed in the July 29, 1977, order of this Court shall continue for both elementary and secondary students. 4. The Columbus defendants shall reexamine their anticipated budget for all phases of the desegregation remedy and shall prepare a fully itemized anticipated budget. 5. On or before October 19, 1977, the Columbus defendants shall commence the bidding process under Ohio law for the acquisition of new school buses and

related equipment necessary for a September 1978 implementation, shall notify the Court of the commencement of the process, and shall tender a schedule which details each of the major steps of that process and indicates the expected date for completion of each step. The Columbus and State defendants shall file a written report with the Court on or before Wednesday, November 9, 1977. Such filing shall include:

(a) a report of the re-examination of the anticipated budget ordered herein;

(b) a detailed progress report on the implementation of Phase I and the defendants' proposal for Phase I efforts during the second semester of the 1977-78 school year;

(c) notification that the bidding process for the acquisition of vehicles and related transportation equipment has commenced, and the schedule and calendar for such process ordered hereinabove;

(d) a progress report on the planning for specific pupil reassignments, employment and training of necessary personnel, reassignment of teaching and administrative staff, and needed relocation and alteration of physical facilities. This report shall include a proposed timetable for the completion of each such activitiy.

APPROVED FOR ENTRY

ROBERT M. DUNCAN
United States District Judge

Dated at Columbus, Ohio this 7 day of October, 1977.

John D. Lyter, Clerk

By J. Cessner
Deputy Clerk

Nos. 77-3365-66, 3490-91 & 3553

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY L. PENICK, et al.,

Plaintiffs-Appellees,

v.

COLUMBUS BOARD OF EDUCATION, et al.,

and

THE OHIO STATE BOARD OF EDUCATION, et al.,

Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division

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Decided and Filed July 14, 1978.

Before: EDWARDS, LIVELY and MERRITT, Circuit Judges.

EDWARDS, Circuit Judge. This is a case wherein the complaints charge racial discrimination in violation of the United States Constitution in the city school system of Columbus, the capital city of Ohio. After a 36-day trial, the District Judge found intentional de jure segregation and a dual school system separated by race in Columbus in 1954 when *Brown* v. *Board of Education*, 347 U.S. 483 (1954), was decided. He found that the Columbus School Board had failed in its duty to desegregate the school system and, on the contrary, had intentionally continued segregation in the two decades following *Brown*. He held that the State Board of Education had the duty to order desegregation of the Columbus system, but had not done so, and, on the contrary, had continued financial support to the segregated system in violation of both Ohio law and the federal constitution. He ordered system-wide desegregation and certified the critical questions for appellate review.

After review of this 6,600 page record, we accept the District Judge's findings of fact as not clearly erroneous and affirm his judgments of law. As to the State Board only, we remand for further consideration.

I BACKGROUND

It was there from the beginning – the notion of equality before the law. The second sentence of the Declaration of Independence of the United States runs, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

There, from the very beginning also, was the notion of a written constitution as fundamental law. In 1787[1] our people committed the new nation to constitutional government to a greater degree than any other in the world. In adopting the Constitution of the United States, our ancestors made it the supreme law of the land[2] controlling the decisions of the

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[1] The United States Constitution was adopted by the Constitutional Convention meeting in Philadelphia in 1787 and became effective when ratified by the ninth of the constituent states on June 21, 1788.

[2] The supremacy clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> U.S. CONST., art. VI, cl. 2.

President of the United States, the United States Congress, and the United States courts, as well as the governors, legislatures and courts of the several states. The United States Supreme Court has the duty to interpret the United States Constitution.[3] All judges in the land, including, of course, this court, are bound to follow its interpretation.[4]

At the Philadelphia convention also, our ancestors wrote a considerable portion of the concept of equality into the Constitution of the new country. In Article IV, section 2, clause 1: "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." Just four years later the people of the new country, through Congress and the state conventions, enacted Amendment V of the Bill of Rights, which contained another fundamental aspect of the general concept: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Although from the beginning the word "person" in the United States Constitution appeared to include slaves, the Constitution also contained specific recognition of the existence of slavery in a number of states. *See* U.S. Const. art. VI, § 2, cl. 3. When the great and bitter conflict over slavery developed, it found the courts holding that the constitutional principles cited above applied to the federal government, but not to the states which chose to sanction slavery. *See Barron* v. *Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857).

The Civil War, in which 550,000 men died, was fought in large measure over the slavery question. At its end Congress and the required number of states adopted the Thirteenth Amendment to abolish slavery. Two years later Congress had been made intensely aware that many Southern states were passing laws to continue the subjugation of former slaves by

[3] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).
[4] *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

statutes aimed directly at them. It was then that the Fourteenth Amendment was born. Ratified in 1868, it read in applicable part:

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.*
>
> U.S. CONST. amend. XIV, § 1 (emphasis added).

The language of the last sentence of Section 1 was drafted by one of Ohio's most famous Representatives, Congressman John Bingham. It was designed by its author to prevent the states from adopting state laws which deprived former black slaves and their progeny of rights equal to those of white citizens.[5]

[5] Bingham, speaking just before the vote in Congress on the Fourteenth Amendment:

> The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict —that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.
>
> CONG. GLOBE, 39th Cong., 1st Sess. 2542.

Bingham applied the principles of Article IV, section 2 and the due process clause of the Fifth Amendment to the states and added the prohibition against any law denying any person "the equal protection of the law."

The constitutional intention of 1868, as Bingham and his associates understood it (much as the United States Supreme Court does today), was not followed for many years. In the post-Reconstruction era black citizens in the Southern states (frequently in the Northern also) were denied access equal to that of whites to such fundamentals of "life, liberty and the pursuit of happiness" as votes, public accommodations, housing, jobs and schools. In 1896 this postslavery system of segregation by race was validated by the United States Supreme Court as to public accommodations on railroads on the theory that the accommodations provided were "separate but equal." *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). By a six sentence dictum the opinion of the *Plessy* court seemed to apply the same rule to public schools.

For over a half century the *Plessy* dictum allowed separate public schools for blacks and whites to be established by state law or by school board authority without court interference. The record also demonstrated over and over that "separate" the schools were for black and white children, but "equal" they were not. In the 1930's and 1940's a series of cases brought before the United States Supreme Court the glaring inequities which existed between higher educational opportunities for whites and those for blacks. *Missouri ex rel. Gaines* v. *Canada*. 305 U.S. 337 (1938); *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950).

The Supreme Court in response ordered relief in every case and in *Sweatt* v. *Painter*, *supra*, it indicated that it reserved decision on the *Plessy* doctrine of separateness as applied to public schools.

The ultimate challenge came in five cases from separate sections of the country – Topeka, Kansas; New Castle County, Delaware; the District of Columbia; Prince Edward County, Virginia; and Clarendon County, South Carolina. During three years of argument and reargument by many of the finest lawyers in the land, the justices, most of whom had written or joined opinions which followed the *Plessy* doctrine, weighed the momentous issue. The decision finally came in a unanimous opinion written by Chief Justice Warren, *Brown* v. *Board of Education*, 347 U.S. 483 (1954). It held that public school separation by race imposed by law violated the United States Constitution's guarantee of "the equal protection of the laws." The date was May 17, 1954. This was 24 years ago.

II THE LAW APPLICABLE TO THIS CASE

The Supreme Court opinion in *Brown I*, noting that in 1868 public education was in its infancy, did not resolve the question of whether those who wrote and adopted the Fourteenth Amendment intended its application to public schools. Nor did it rely directly upon the inequalities which had characterized the separate black and white schools in the interim. It held that the general constitutional guarantee of "equal protection of the laws" must be applied to the system of public education which had developed in the interim between 1868 and 1954.

The language of the opinion was simple and direct. The opinion of the Court in *Brown* v. *Board of Education*, (henceforth *Brown I, supra*) said:

> We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.
>
> *Id.* at 492-93.

The opinion of the Court then proceeded to overrule *Plessy* v. *Ferguson, supra.* The dispositive sentences were:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.
>
> *Brown I, supra* at 495.

Twelve years later, after great resistance to desegregation

and many delays in carrying out the Supreme Court's ruling, the Court handed down *Green* v. *County School Board,* 391 U.S. 430 (1968). The opinion by Justice Marshall said:

> The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*
>
> *Id.* at 439 (emphasis in original).

Three years later, Chief Justice Burger (again for a unanimous Court) wrote in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971):

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.
>
> *Id.* at 15.
>
> • • •
>
> In *Green,* we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. 391 U.S., at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.
>
> *Id.* at 18.

In *Swann* the District Judge's opinion referred to a white/black ratio of 71-29%. As to this the opinion of the Court said:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that

approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

> We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.
>
> *Id.* at 25 (footnote omitted).

Chief Justice Burger then turned to the publicly disputed question of bus transportation as part of a desegregation plan:

> The importance of bus transportation as a normal and accepted tool of education policy is readily discernible in this and the companion case, *Davis, supra*. The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.
>
> *Id.* at 29-30 (footnote omitted).

The *Swann* opinion dealt more thoroughly than any other opinion of the Court with the method of proof of constitutional

violations and the Court's remedial powers when such violations were found. It will be quoted extensively later in this opinion. For the moment, we conclude this digest of *Swann* with two of Chief Justice Burger's most meaningful sentences:

> As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.
>
> *Id.* at 16.

Until the 1970's school desegregation cases were largely limited to Southern states. Then came a case where unconstitutional segregation had been found in the Park Hill district of Denver, Colorado. In *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), Justice Brennan wrote:

> Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. Several considerations support this conclusion. First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white. Similarly, the practice of building a school — such as the Barrett Elementary School in this case — to a certain size and in a certain location, "with conscious knowledge that it would be a segregated school," 303 F. Supp., at 285, has a substantial reciprocal effect on the racial composition of other nearby schools.'
>
> *Id.* at 201-02 (footnote omitted).

• • •

> In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions.
>
> *Id.* at 203.
>
> • • •
>
> [W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.
>
> *Id.* at 208.

The importance of intentional discrimination, as opposed to discriminatory impact from racially neutral causes, was further emphasized by the Supreme Court in *Washington* v. *Davis*, 426 U.S. 229 (1976), where the Court, in an employment discrimination case, said:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.
>
> *Id.* at 239 (emphasis in original).

Finally, for this brief review, in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), the Supreme Court reemphasized the component of intentional discrimination which had been stressed in *Keyes* and the necessity for matching the scope of the remedy to the nature of the violation which had been outlined in *Swann*:

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington* v. *Davis, supra.* All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U.S., at 213.
>
> *Dayton, supra* at 420.

We note that in the *Dayton* case Justice Rehnquist's opinion cites with approval every case except one which we have quoted above. Indeed, in the long history of the United States Supreme Court desegregation law which has been written since 1954, no case has purported to overrule or cast in doubt any of the prior precedents which began with *Brown* v. *Board of Education*.

III STATEMENT OF THIS CASE

Plaintiffs-appellants in this appeal are two groups of parents of children who filed complaints contending that their children (and all other children in the Columbus schools) had been deprived of their constitutional right to equal protection of the law by intentional racial segregation in the public schools of Columbus. Defendants-appellants are the Columbus Board of Education and the Ohio State Board of Education. Both defendants by pleadings and evidence at trial denied any intentional segregation in violation of the Constitution and claimed that any school segregation which existed at the time of the filing of the case was due to segregated housing patterns over which they had no control, or due to a "neighborhood" school policy which they claimed to be constitutionally permissible.

After a lengthy trial, United States District Judge Robert Duncan entered an Opinion and Order, dated March 8, 1977. *Penick* v. *Columbus Board of Education*, 429 F.Supp. 229 (S.D. Ohio 1977). The most succinct finding of fact in his lengthy analysis of the 6,600 pages of evidence is as follows:

> [D]uring the 1975-76 school year, when this case was tried, 70.4% of all the students in the Columbus Public Schools attended schools which were 80-100% populated by either black or white students; 73.3% of the black administrators were assigned to schools with 70-100% black student bodies; and 95.7% of the 92 schools which were 80-100% white had no black administrators assigned to them.
>
> *Id.* at 240.

The District Judge reviewed the history of Ohio's school laws and the Columbus School Board's administration of its schools from 1868 to 1954 when *Brown I* was decided. He found from the evidence that in 1954 the Columbus Board was maintaining five schools which had been built and operated as "black" schools. He found that, aside from one brief period, black Students had been intentionally segregated. He held that "in 1954 there was not a unitary school system in Columbus." 429 F. Supp. at 236.

In detailed review of the actions of the Columbus Board in the post-1954 period, the District Judge found that by building schools at locations which would guarantee their opening as "one-race schools," gerrymandering school districts on a racial basis, allowing optional assignment of white students to white schools and assigning black teachers and administrative personnel to black schools in the great majority of instances and white teachers and administrative personnel to white schools in the majority of instances, the Board had not followed a "racially neutral" policy, but to the contrary, had intentionally chosen alternatives which were predictably segregative and from which it was reasonable to infer segregative intent. As to the Columbus Board, Judge Duncan entered the following finding of segregative intent:

> From the evidence adduced at trial, the Court has found earlier in this opinion that the Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown I* was decided in 1954. The Court has found that the Columbus Board of Education never actively set out to dismantle this dual system. The Court has found that until legal action was initiated by the Columbus Area Civil Rights Council, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition of the student enrollment at those schools. The Columbus Board even in very recent times, has approved optional attendance zones, discontiguous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has abjured workable suggestions for improving the racial balance of city schools.
>
> Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hir-

> ing and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion.
>
> 429 F.Supp. at 260-61.

In this same opinion the District Judge analyzed the legal responsibilities of the State Board of Education and found a failure to act when the State Board had a clear legal duty to act to prevent the creation and continuation of segregation in the Columbus schools. The District Judge found intentional violation of the Constitution on the part of the State defendants in the following paragraph:

> The failure of these state defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise.
>
> *Id.* at 263-64.

The District Judge thereupon entered an order permanently enjoining the Columbus Board of Education and the State Board from "creating, promoting, or maintaining unconstitutional racial segregation in any Columbus school facilities" and directing the Columbus Board of Education and the State Board "to formulate and submit to the Court proposed plans for the desegregation of the Columbus Public Schools . . . ." *Id.* at 268.

Before such plans were acted upon by the District Judge, the Supreme Court of the United States decided the case of *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977). On the heels of that case, the Columbus Board of Education moved for leave to amend its previously proposed remedy plan and sought the court's reconsideration of the District Judge's

previous findings concerning constitutional violation. After reviewing the specific language employed by the opinion of the Court in the *Dayton* case and distinguishing the facts as he saw them in the Columbus case from the facts recited by the Supreme Court in relation to *Dayton*, the District Judge reiterated his findings of de jure and intentional systemwide segregation. Without approving any plan which had been submitted either by the Columbus Board or the State Board, but expressing a preference for the State Board plan, the District Judge outlined a series of principles for the parties to follow in desegregating the Columbus school system. The first sentence read: "The plan must be capable of desegregating the entire Columbus school system." He then certified the various orders to which we have referred as presenting controlling questions of law as to which there are substantial grounds for differences of opinion, and further certified that immediate appellate review might materially advance ultimate termination of the litigation. These appeals followed, with appellants contesting most of the findings and legal conclusions of the District Judge.

We review the findings of fact and conclusions of law of the District Judge in this case against the statements of law by the Supreme Court of the United States in the preceding section, which we believe control our decision.

IV THE COLUMBUS SCHOOLS BEFORE 1954

The first question which Judge Duncan dealt with in his opinion was "whether [the Columbus school system] was unitary (no unlawful racial segregation) or dual (unlawful racial separation)" in 1954 when the United States Supreme Court decided *Brown* v. *Board of Education*, *supra*, 429 F. Supp. at 234. He held that in 1954 the system was unlawful and dual. His careful analysis bears quotation:

> Prior to 1871, the evidence indicates not only a complete separation of the races in the Columbus school

system, but also repeated demands by black citizens for adequate schools for black children.[1]

In 1871 the Supreme Court of Ohio decided the case *State ex rel. Garnes* v. *McCann*, 21 Ohio St. 198. In that case, a black parent challenged an Ohio statute which "authorized and required" all the boards of education in the state "to establish, within their respective jurisdictions, one or more separate schools for colored children, when the whole number, by enumeration, exceeds twenty . . . ." The statute is quoted in the Supreme Court's opinion, 21 Ohio St. at 206. Recognizing that blacks in the post-Civil War era were entitled to protection under the Fourteenth Amendment to the United States Constitution, the Supreme Court of Ohio nevertheless held that the statute providing for separate schools for black children affronted neither the United States nor the Ohio Constitution. Thereafter, in 1878, the General Assembly of Ohio enacted House Bill No. 105, 75 Ohio L. 513, which provided that "where in their judgment it may be for the advantage of the district to do so, [local boards of education] may organize separate schools for colored children . . . ." This statute in turn was repealed in 1887, 84 Ohio L. 34. In passing on the state of the law effective in 1888, the Supreme Court of Ohio held that Boards of Education could not maintain separate schools for black and white students. *Board of Education* v. *State*, 45 Ohio St. 555 (1888).

It was 1878 before the first black person graduated from high school in Columbus. In that year all black children attended Loving School at the corner of Long and Third Streets, many passing closer white schools en route. In 1879 a very few blacks attended Second Avenue, Douglas and East Friend schools. However, with only these few exceptions, blacks attended Loving School.

[1] See, *e.g.*, *Early Black History in the Columbus Public Schools*, by Myron T. Seifert, historian for the Columbus Public Schools, admitted at trial as plaintiffs' exhibit 351.

In 1881 by resolution the Columbus Board abolished separate schools for black children. Children were assigned to attend school districts where they dwelt. Miss Celia Davis, a black woman, taught at the racially mixed Medary school in 1897. Several other blacks taught in mixed schools during the period 1900-1907.

The Columbus Board of Education caused the Champion Avenue School to be built in 1909. The school, located in a predominantly black residential district, was staffed with all black teachers. In August, 1909, Charles W. Smith, a black parent, sued the Columbus Board of Education in the Common Pleas Court of Franklin County, alleging that the Board's action establishing Champion as a black school was illegal under Ohio law. The Court of Common Pleas heard evidence, and on March 11, 1911, dismissed the case. Mr. Smith appealed the dismissal, and on December 31, 1912, the Circuit Court of Franklin County in Case No. 3094 affirmed the trial court's action. On January 6, 1913, Dr. William O. Thompson, one of the members of the Columbus Board of Education, reported to the Board that the Circuit Court had "affirmed the opinion of Judge Rogers, and further held that the creation of a school district is a matter of the discretion of the Board of Education, and not a subject for judicial determination, and dismissed the appeal." Apparently the trend earlier established toward integration then halted in Columbus.

During the 1920's and early 1930's Champion remained a school populated by black students with predominantly black faculty, and a black principal. Although some secondary and elementary schools were attended by both races, all of the black teachers employed in the system were at Champion.

In 1938 Pilgrim Junior High, which had been a racially mixed school, was converted to an elementary school. Champion's then all-black elementary faculty was transferred to Pilgrim, and Champion became a junior high school with a black faculty and black students. The school attendance areas were gerrymandered so that white

students who lived very near Pilgrim School were permitted to attend Fair Avenue School, which was considerably more distant from their houses on Greenway and Taylor Avenues. White children who lived on those streets had attended Pilgrim before it was converted to an elementary school for black children.

In 1941 all black teachers in the system were employed at Mt. Vernon, Garfield, Pilgrim or Champion Schools, all predominantly black schools. By 1943 five schools were attended almost exclusively by black children, and the faculties of each were composed entirely of black teachers. In September of that year the entire professional staff of Felton School, composed of 13 teachers and a principal, was removed and replaced with 14 black persons. The same kind of 100% white to 100% black faculty transfer had occurred at the Mt. Vernon and Garfield schools in prior years. In September, 1943, the Vanguard League, a civil rights organization, complained to the Columbus Board about gerrymandering as follows:

> A more striking example of such gerrymandering is Taylor and Woodland Avenues between Long Street and Greenway. Here we find the school districts skipping about as capriciously as a young child at play. The west side of Taylor Avenue (colored residents) is in Pilgrim elementary district and Champion for Junior High. The east side of Taylor (white families) is in Fair Avenue elementary district and Franklin for Junior High.
>
> Both sides of Woodland Avenue between Long and Greenway are occupied by white families and are, therefore, in the Fair Avenue-Franklin district. Both sides of this same street between 340 and 500 are occupied by colored families and are in the Pilgrim-Champion, or "colored" school, district. White families occupy the residences between 500 and 940, and, as would be expected, the "white" school district of Shepard-Franklin applies.

When *Brown I* was decided in 1954, there were no black high school principals in Columbus. All black administrators were assigned to predominantly black schools. There were no white principals in predominantly black schools. Under the policy and practice of the Columbus defendants' predecessors, black student teachers were required to do their student teaching at predominantly black schools.

Giving full recognition to substantial racial mixing of both students and faculty in some schools, the Columbus school system cannot reasonably be said to have been a racially neutral system on May 17, 1954. The then-existing racial separation was the direct result of cognitive acts or omissions of those school board members and administrators who had originally intentionally caused and later perpetuated the racial isolation, in the east area of the district, of black children and faculty at Champion, Mt. Vernon, Garfield, Felton and Pilgrim. Thus, the Columbus Board of Education maintained what amounted to an enclave of separate, black schools on the near east side of Columbus, thereby depriving hundreds of black children an opportunity for an integrated educational experience. Defendants do not appear to assert that these results were an accommodation to the neighborhood school concept.

In the Court's view, in 1954 the Columbus defendants' predecessors had caused some black children to be educated in schools that were predominantly white; however, the Board also deliberately caused at least five schools to be overwhelmingly black schools, while drawing some attendance zones to allow white students to avoid these black schools. This separateness cannot be said to have been the result of racially neutral official acts. As a result, in 1954 there was not a unitary school system in Columbus.

429 F.Supp. at 234-36.

Our review of this record fully supports the District Judge's conclusion. We certainly cannot declare any of his findings

to be "clearly erroneous." Indeed, we do not find in appellants' briefs or oral arguments before our court any serious efforts to dispute the District Judge's findings of fact concerning pre-1954 segregation. While the Columbus school system's dual black-white character was not mandated by state law as of 1954, the record certainly shows intentional segregation by the Columbus Board. As of 1954 the Columbus School Board had "carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system." *Keyes* v. *School District No. 1, supra* at 201-02. This is the legal predicate for the District Judge's finding of a dual school system.

Under these circumstances, the Columbus Board of Education has been under a constitutional duty to desegregate its schools for 24 years. *Brown* v. *Board of Educ. of Topeka*, 347 U.S. 483 (1954) [*Brown I*]; *Green* v. *County School Bd. of New Kent Co.*, 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973); *Davis* v. *School Dist. of City of Pontiac, Inc.*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *NAACP* v. *Lansing Bd. of Educ.*, 559 F.2d 1042 (6th Cir.), *cert. denied*, 98 S.Ct. 635 (1977).

V THE COLUMBUS SCHOOLS AFTER 1954

(a) *Pupil Assignment.* In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra*, Chief Justice Burger, for a unanimous Court, spelled out the factors which identify a school as a "white school" or as a "Negro school." The two most important of these involve racial discrimination in the assignment of pupils and in the assignment of faculty. *Id.* at 18. In the same opinion, the Chief Justice approved the District Court's use of the 29-71% ratio of black to white children there involved as a "starting point" in determining both constitutional violation and remedy. *Id.* at 25:

> Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

In the present case, the District Judge made similar use of black-white ratios in determining both "racially identifiable" schools and "one race" schools and in "shaping a remedy." His definition of terms is important to the understanding of his findings:

> The concept of racial identifiability or unidentifiability is used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the actual (or estimated) system-wide percentage of black pupils. Schools which have a percentage of black pupils within this range are racially unidentifiable, or balanced. Schools which have a black population in excess of this range are racially identifiable, or imbalanced, black schools. Schools having a black population less than the range are racially identifiable, or imbalanced, white schools. The Court has accepted the figures used by Dr. Gordon Foster concerning the Columbus Public Schools:

Year	Percentage Black Pupils in System	Statistical Variation	Range
1950-57	15 % (estimate)	± 5%	10 % - 20 %
1957	20 % (estimate)	± 10%	10 % - 30 %
1964 primary	25 % (estimate)	± 15%	10 % - 40 %
1964 secondary	26.6%	± 15%	11.6% - 41.6%
1975	32.5%	± 15%	17.5% - 47.5%

• • •

Black School – A school having a black student enrollment in excess of the applicable range of variance from the system-wide percentage of black pupils – that is, a racially identifiable black school. See "racially identifiable."

White School – A school having a black student enrollment which is less than the applicable variance from the system-wide percentage of black pupils – that is, a racially identifiable white school.

One Race School – A school in which 90% or more of the students are of a single race.

429 F.Supp. at 268-69.

We consider the ratios used by the District Judge to have been properly employed under the standards of *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.*

In relation to pupil assignment, we have already noted that the District Judge found concerning the 1975-76 school year that over 70% of the students in the Columbus school system attended schools which were over 80% white or over 80% black.

As shown below, in the 1975-76 school year in Columbus, 85% of the elementary schools, 65% of the junior high schools, 67% of the senior high schools, 60% of the special schools, and 100% of the junior-senior high schools were racially identifiable as defined above.

Analysis of Student Population Figures for 1975-76[6]

		Racially Identifiable Schools	
		Black	*White*
Elementary	(123 total)	35	69
Junior High	(26 total)	7	10
Senior High	(15 total)	4	6
Junior-Senior	(3 total)	2	1
Special	(5 total)	1	2

		80% Black	*80% White*
Elementary	(123 total)	25	71
Junior High	(26 total)	4	12
Senior High	(15 total)	2	7
Junior-Senior	(3 total)	0	1
Special	(5 total)	1	2

		90% Black	*90% White*
Elementary	(123 total)	16	55
Junior High	(26 total)	4	6
Senior High	(15 total)	1	3
Junior-Senior	(3 total)	0	0
Special	(5 total)	1	0

		96% Black	*96% White*
Elementary	(123 total)	10	34
Junior High	(26 total)	2	2
Senior High	(15 total)	1	1
Junior-Senior	(3 total)	0	0
Special	(5 total)	1	0

[6] These charts were prepared from information contained in Plaintiffs' Exhibit No. 11, which is included in the Appendix at I-1. Exhibit No. 11 has not been disputed by Appellants and has been cited in their brief, albeit for other purposes.

The following schools are in the 96% black group:

Elementary
Beatty Park
Eastgate
Fair
Garfield
Gladstone
Hamilton
Lexington
Shepard
Trevitt
Windsor

Junior High
Champion
Monroe

Senior High
East

Special Schools
Bethune Center

The following schools are in the 96% white group:

Elementary
Alpine
Avondale
Binns
Cedarwood
Clinton
Dana
Devonshire
Forest Park
Fornof
Georgian Heights
Gettysburg
Glenmont
Hubbard
Huy
Indian Springs
Kenwood
Liberty
Lindberg
Maize
Maybury
Northridge
Oakland Park
Olde Orchard
Salem
Scioto Trail
Sharon
Siebert
Southwood
Stockbridge
Valley Forge
Valleyview
Walford
West Broad
Winterset

Junior High
Buckeye
Woodward Park

Senior High
Whetstone

We recognize, of course, that racial separation based upon facts and circumstances beyond the control of school boards may constitute de facto segregation without necessarily representing violation of the Fourteenth Amendment. However, we have previously pointed out that the District Judge on review of pre-1954 history found that the Columbus schools were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools. The pupil assignment figures for 1975-76 demonstrate the District Judge's conclusion that this burden has not been carried. On this basis alone (if there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation.

Of course, this Northern school case is distinguished from the classic Southern school cases in two important respects: first, Ohio did not, after 1887, require dual school systems by state law; and second, some black students did go to school in Columbus in 1954 in largely white schools. Since, however, a substantial portion of black students, as shown by the District Judge's findings and as supported by the record, were intentionally segregated in 1954, we do not believe these two distinctions serve to invalidate the District Judge's findings of a de jure dual school system. *See United States* v. *Board of Commissioners of Indianapolis*, 474 F.2d 81, 82-85 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

In *Keyes, supra*, the Court said:

> Indeed, to say that a system has a "history of segregation" is merely to say that a pattern of intentional segregation has been established in the past. Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.

> In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. ***Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.***
>
> *Id.* at 210 (emphasis added).

Clearly "a meaningful portion of the [Columbus] system [was] found to be intentionally segregated" by the District Judge. Clearly also the Columbus Board has not carried the "burden" *italicized* in the quotation above.

> *The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.*
>
> *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 267 (1977) (emphasis added).

(b) *Segregation in School Year 1975-76.*

We now turn to an analysis of the District Judge's findings of unconstitutional segregation as of school year 1975-76.

Our basic problem is to determine whether the segregation in Columbus schools in the school year 1975-76 clearly shown in the section immediately above was intentionally and, hence, unconstitutionally created or whether, as claimed by the Columbus Board of Education, it resulted from neighborhood housing segregation which the Columbus Board of Education could not control, and the racially "neutral" Columbus Board policy of neighborhood schools. In this regard, after noting the substantial evidence of segregation in pupil, teacher and administrator assignments, we look next at the Columbus Board's school site choices and its construction program.

(c) *School Construction.* In our consideration of the District Judge's findings of fact and conclusions of law concerning

the Columbus Board's school construction programs between 1954 and 1975, we have in mind Chief Justice Burger's description of the importance of school construction and closings in school desegregation cases:

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the

mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra* at 20-21.

In the years intervening between 1954 and the filing of the first complaint in this case in 1975, the parties agree that Columbus as a city grew enormously in boundaries (from 40 to over 173 square miles), and in public school population from 46,352 to 95,998. The result, of course, was a great amount of school construction. This factor offered consequent opportunities for the school board to make inroads upon the segregation (whether de facto or de jure) of black children and white children found by the District Judge to have existed in 1954.

The District Judge's analysis of the history of Columbus school construction has such relevance to the question of whether the 1975-76 school segregation was intentionally created that we quote it extensively:

> The Columbus defendants have contended throughout that they have followed a neutral neighborhood school policy. In keeping with that policy, schools have generally been built in locations where the expanding and growing population demanded additional facilities. Of 103 schools constructed between 1950 and 1975, 87 opened with a racially identifiable student body according to the calculations of Dr. Foster. Of the 87 schools, three have been closed. These schools closed with racially identifiable student populations. Seventy-one of the 87 new schools remained racially identifiable at the time of trial.
>
> It is necessary for the Court to consider those foreseeable effects of the construction practice which promote or preserve a segregated school system. It is

apparent to the Court, and presumably to the defendants, that schools which open with a racially identifiable student body tend to stay that way. The Court finds that in some instances initial site selection and boundary changes present integrative opportunities.

The evidence supports a finding that the Columbus defendants could have reasonably foreseen the probable racial composition of schools to be constructed on a given site. In some instances the Columbus defendants had actual knowledge of the likelihood that some schools would open and remain racially identifiable if built on the proposed sites. One such case was Gladstone Elementary School. See map 1 in the appendix to this opinion. Although Gladstone was apparently opened in 1965, the first statistics available concerning its racial composition concern the year 1966, when it had a student population which was 78% black. Gladstone's black enrollment has been in excess of 90% since 1967. Mr. Lumpkin, who later became the president of the Gladstone Parent Teacher Association, testified that prior to its construction he communicated to the Board of Education that Gladstone would predictably open as a predominantly black school. The 1960 census map shows that in that year the area in which Gladstone was eventually built was predominantly white. The 1970 census map indicates that this same area was predominantly black. This reflects the definite trend of an expanding black population northward into this area in the 1960's. This trend was fairly well advanced in 1966, given Gladstone Elementary's 78% black enrollment that year.

Gladstone was built between Hamilton Elementary and Duxberry Park Elementary with the greater portion of the Gladstone attendance zone being drawn from the southwestern portion of the former Duxberry zone. This section of Duxberry had a higher black density than did the northern and eastern sections. Thus, the black student population in Duxbury dropped from 40% in 1965 to 33%

in 1966. Linden Elementary, to the north of Hudson Street, remained virtually 100% white throughout the middle 1960's. The construction of Gladstone south of Hamilton and Duxberry served to contain the black student population in the area south of Hudson Street.

The need for greater school capacity in the general Duxberry area would have been logically accommodated by the construction of Gladstone north of its present location, nearer to Hudson Street. This would, of course, require some redrawing of boundary lines in order to accommodate the need for class space in Hamilton and Duxberry. If, however, the boundary lines had been drawn on a north-south pattern rather than an east-west pattern, as some suggested, the result would have been an integrative effect on Hamilton, Duxberry and the newly-constructed school.

The Court also finds that the site selection and attendance zone boundaries for Sixth Avenue Elementary resulted in a foreseeably blacker school. Sixth Avenue opened as a primary center (grades K-3) in 1961 and closed in 1973. During this entire period, Sixth Avenue was racialy identifiable with a black student population of at least 85%.

The Sixth Avenue school was built in accordance with a recommendation contained in the 1958-59 study of the Public School Building Needs of Columbus, Ohio. Recommendation number 11 on page 58 of that document describes an area bounded by High Street on the west, Chittenden Avenue on the north, New York Central Railroad on the east, and Fifth Avenue on the south. Sixth Avenue elementary was built on the proposed site. The attendance zone for Sixth Avenue was as recommended, except that Fourth Street was its western boundary. This area can generally be described as the eastern portion of the Weinland Park Elementary attendance zone and the northeastern corner of the Second Avenue Elementary attendance zone. Both the 1960 and 1970 census maps (and the underlying statistical data)

show that these portions of the former Weinland Park and Second Avenue Elementary attendance zones had the highest percentage of black residents within the area. The census data shows that the population west of Fourth Street was largely 0 to 27.9% black with two or three blocks being in the 28 to 49.9% range. The east side of Fourth Street is generally in the 50 to 89.9% black range, with several blocks in the 90 to 100% black category. The Sixth Avenue attendance zone consists almost entirely of 50 to 100% black population. The black population in the area left within the attendance zones of Weinland and Second after Sixth opened is generally below 27.9%, with a few blocks in the 28% to 49.9% range.

In 1964, three years after Sixth Avenue opened and the first year for which racial statistics are available, Sixth Avenue had a black student enrollment of 91%. In that year Weinland Park and Second Avenue had black student populations of 30% and 28%, respectively. The boundary lines for these schools remained relatively unchanged until 1973, when Sixth Avenue closed. Sixth Avenue closed with a black enrollment of 94.6%. In that year Weinland Park and Second had black enrollments of 30.5% and 16.7%, respectively. In the 1974-75 school year following the closing of Sixth Avenue, the boundary lines for Weinland and Second were redrawn to resemble the 1960 attendance zones. With the closing of Sixth the black population of Weinland rose from 30.5% to 46.7% while Second Avenue rose from 16.7% to 20.7.% The Court finds that the construction site and attendance zone drawn for Sixth Avenue Elementary between 1961 and 1973 resulted in Sixth Avenue being the black school in the area while making Weinland Park and Second Avenue whiter.

The impact of building a new elementary school at the Sixth Avenue location and drawing the attendance zone boundaries where they were drawn was clearly foreseeable to the Columbus defendants. Some students living in the area east of Fourth Avenue, shown to be

predominantly black on both the 1960 and 1970 census maps, were compelled to walk to Sixth even though Weinland Park was closer to their homes. Even if the Court were to find compelling non-segregative reasons for the construction of this new school on its Sixth Avenue site, it is readily obvious from the census maps that the objectives of racial integration would have been better served, without abandoning the neighborhood school policy, by drawing the attendance zones east and west between High Street and the railroad tracks, rather than north and south along Fourth Street. The Columbus defendants have offered no explanation for the fashion in which Sixth Avenue was opened and maintained during this period.

The Court is well aware of the Board's obligation to provide class space as the need arises, whether it be in an area of expending geographic growth, or within the inner-city area due to increasing population or the closing of obsolete structures. Given segregated residential patterns, not all schools can be built in an integrated setting. In such circumstances the selection of sites for new schools alone may not serve as a tool for integration. The intervening plaintiffs argue that the construction of a school in an area known to have been covered by racially restrictive covenants and subject to discriminatory real estate practices constitutes an impermissible participation by the school officials in racial discrimination. The Court does not infer segregative intent from the mere construction of schools in an area needing the facilities even though that area had been covered by racial covenants. Without the use of pairings, transportation, or other techniques, the racial imbalance in these schools could not have been cured by the siting of schools even had the Columbus defendants devoted their attention to the racial integration of the schools.

429 F.Supp. at 241-43.

The record of this trial supports these findings of fact by

the District Judge. They certainly cannot be said to be clearly erroneous. We also agree with the District Judge's analysis of the evidence, adding only two comments. First, the summary of the gross statistics as found by the District Judge shows that of 103 schools constructed between 1950 and 1975, 87 opened racially identifiable and that as of the time of trial, 71 of the 87 remained racially identifiable. In our view, this requires a very strong inference of intentional segregation. Second, this record actually requires no reliance upon inference, since, as indicated above, it contains repeated instances where the Columbus Board was warned of the segregative effect of proposed site choices, and was urged to conside alternatives which could have had an integrative effect. In these instances the Columbus Board chose the segregative sites. In this situation the District Judge was justified in relying in part on the history of the Columbus Board's site choices and construction program in finding deliberate and unconstitutional systemwide segregation.

During most of the history of the Columbus schools, the same patterns of segregation which we have just described in relation to pupil assignments to schools by race prevailed also in relation to teacher and administrator assignments.

All black teachers in the system were assigned to five schools recognized as black in 1954. When Champion was built, it opened with an all black faculty. When it was decided to make Champion a junior high school and send its overwhelmingly black elementary student body to Pilgrim, all of the white faculty at Pilgrim was transferred out and replaced with an all black faculty. Similarly obvious segregation of black teachers occurred as found by the District Judge in at least three other schools prior to 1954.

The District Judge, however, also found similar teacher assignments by race into the 1970's:

> Between 1964 and 1973 the Columbus defendants generally maintained their prior practice of assigning black

> teachers to those schools with substantial black student populations. As an example, as late as the 1972-73 school year, there were 250 black elementary teachers assigned to schools in which the student body was 80-100% black, which represented 63.3% of all of the black elementary teachers in the system. In the same school year, 34 elementary schools, all of which contained 80-100% white student bodies, had no black teachers assigned to them.
>
> 429 F.Supp. at 238.

Yet the District Judge entered no orders to desegregate the faculty or staff. The record clearly shows both when and why the Columbus Board ceased to assign teachers by race. As to teachers in the 1975-76 school years, the District Judge found:

> The number of black teachers in each school almost compares to the ratio of black to white teachers in the total system. Suffice it to say that this has occurred only after the Ohio Civil Rights Commission's complaint and the consummation of a consent order before that Commission. Moreover the Court cannot find, as plaintiffs urge, that the Columbus defendants have failed to comply with the consent order . . . .[7]
>
> *Id.* at 259-60.

Obviously it was no "neutral" neighborhood school concept which occasioned generations of black teachers to be assigned almost exclusively to black schools until the Ohio Civil Rights Commission complaint was settled in July of 1974.

(d) *Gerrymandering, Pupil Options, Discontiguous Pupil Assignment Areas, Etc.* This record also shows instances of intentional employment of devices which allowed white students to avoid attendance at a primarily black school, or which required black students to attend a primarily black school in

[7] Apparently this order and compliance therewith also apply to administrators.

place of a closer white school. These instances can properly be classified as isolated in the sense that they do not form any systemwide pattern. They are significant, however, in indicating that the Columbus Board's "neighborhood school concept" was not applied when application of the neighborhood concept would tend to promote integration rather than segregation.

As to these instances, the District Judge made some specific findings (which the Columbus Board barely disputes) which we cannot hold to be "clearly erroneous":

> The opportunity for active integration did exist, however, without the use of transportation, in some parts of the city. Even greater integration could have been achieved with the use of pairings and limited transportation. This opportunity existed, and continues to exist in those areas of the city where the population shifts from one race to another. An examination of the census maps for the years 1950, 1960 and 1970 discloses a general pattern of high density (50 to 100%) black population in the center of the city fringed by areas of lesser, but still substantial, (10 to 50%) black population. The remainder of the city is predominantly white, although there are pockets of white population within the central city area, and pockets of black population in the outlying areas.
>
> The Columbus defendants argue that housing in the City of Columbus is segregated as a result of private discrimination and other factors affecting residential development over which the school board has no control and little influence. The Columbus defendants maintain that they have adopted a racially neutral neighborhood school policy. They contend that the use of a neighborhood school policy in a city with segregated housing patterns results, through no fault of the school authorities, in racially imbalanced schools. Under the neighborhood school policy, the site selected for a new school limits

the attendance zone boundaries that can be drawn for that school. The evidence shows that in some instances the need for school facilities could have been met in a manner having an integrative rather than a segregative effect.

The Near-Bexley Option

East of the downtown area of Columbus, and entirely surrounded by the Columbus city limits, lies the City of Bexley, Ohio. East of Bexley, and also entirely surrounded by the Columbus city limits, is the City of Whitehall, Ohio. With the exception of one small area of Columbus which jumps across Alum Creek to the eastern side of the creek, the western boundary of Bexley follows the course of Alum Creek. The Columbus residential area to the west of Alum Creek was in 1960 and 1970, according to census data, heavily populated by blacks. For that area in those years, census tracts generally appear as either 50-89% black or 90-100% black. A different picture existed for the area to the east of Alum Creek, encompassing the City of Bexley and the small portion of Columbus which lies immediately east of the creek. According to census data, 99% of Bexley residents were white in 1960, and 99.3% were white in 1970. Census data further indicate that in 1960 there were 159 people residing in that area of Columbus which lies immediately east of Alum Creek; all of these people were white.

From the 1959-60 school year through the 1974-75 school year, the Columbus Board of Education established and maintained an optional attendance zone encompassing the area of Columbus which lies directly east of Alum Creek. Students living in that area were within the attendance areas of schools located to the west of Alum Creek, nearer the Columbus downtown area. This 1959-1975 option permitted these students to elect to attend Columbus city schools located to the east of the City of Bexley. For ease of reference, the

Court will refer to this option as the "Near-Bexley Option."

Absent the Near-Bexley Option, students living in the optional zone area would have been required to attend Fair Avenue Elementary (opened in 1890), Franklin Junior High School (opened in 1898) and East Senior High School (opened in 1922). The following statistics are applicable to these near-east side schools:

	1964	1969	1974
Fair Avenue Elem.			
% black students	92.0	95.0	96.7
% black faculty	83.3	37.1	23.3
Franklin Jr. H.S.			
% black students	85.8	96.3	93.7
% black faculty	32.6	34.6	45.8
East Sr. H.S.			
% black students	94.9	98.9	98.9
% black faculty	12.7	28.9	31.3

The schools on the receiving end of the option were Fairmoor Elementary (opened in 1950), Eastmoor Junior High School (opened in 1962) and Johnson Park Junior High School (opened in 1958), and Eastmoor Senior High School (opened in 1955). The following statistics are applicable to these schools:

	1964	1969	1974
Fairmoor Elem.			
% black students	0.1	0.9	4.6
% black faculty	0	4.0	18.2

Eastmoor Jr. H.S.			
% black students	30.5	34.4	45.3
% black faculty	0	9.8	15.2
Johnson Park Jr. H.S.			
% black students	0.3	2.9	26.7
% black faculty	0	2.0	12.7
Eastmoor Sr. H.S.			
% black students	10.6	17.8	34.9
% black faculty	0	4.0	15.2

Eastmoor Junior High School was a receiving school for the Near-Bexley Option during the 1959-60, 1960-61, and 1963-64 through 1974-75 school years. Johnson Park was a receiving school for the option during only the 1961-62 and 1962-63 school years; there are no racial statistics available for Johnson Park Junior High School for these two years. The 1960 census data indicate that the Johnson Park attendance area was predominantly white at that time.

The Near-Bexley Option, then, concerned a small, white enclave on Columbus' predominantly black near-east side. The option area, although part of Columbus, had more in common, geographically and racially, with Bexley than with Columbus. In practical effect, the Near-Bexley Option permitted white students in the optional zone to escape attendance at black Fair Avenue Elementary, Franklin Junior and East Senior High Schools, and permitted them instead to attend white (or whiter) Fairmoor Elementary, Eastmoor Junior or Johnson Park Junior, and Eastmoor Senior High Schools. And, as an examination of maps 2, 3, and 4 in the appendix demonstrates, to exercise the option Columbus students had to traverse the City of Bexley to arrive at the option schools.

Nothing presented by the Columbus defendants at trial, at closing arguments, or in their briefs convinces the Court that the Near-Bexley Option was created or maintained for racially neutral reasons. The Court finds that the option was not created and maintained because of overcrowding or geographical barriers.

These defendants contend that the option involved only a few students. The July 10, 1972, minutes of the State Board of Education, at page 44, appear to indicate that in 1972, there were 25 public elementary school students and two public high school students residing in the optional zone. However, the fact that the option was created, and maintained by the Columbus Board of Education for some 16 school years, is of itself some evidence that the option was not merely a paper exercise.

The Court is not so concerned with the numbers of students who exercised or could have exercised this option, as it is with the light that the creation and maintenance of the option sheds upon the intent of the Columbus Board of Education. It is noteworthy that the July 10, 1972, minutes of the State Board of Education indicate awareness by the State Board that a proposed transfer of the Near-Bexley Option area to the Bexley school district "[r]aises the question of percentage of racial mix." (The proposed transfer was opposed by the Columbus Board of Education, and was denied by the State Board.) Quite frankly, the Near-Bexley Option appears to this Court to be a classic example of a segregative device designed to permit white students to escape attendance at predominantly black schools.

Highland, West Mound and West Broad Elementary Optional Zones and Boundary Changes

Another area illustrative of action by the Board promoting racially segregated schools is on the west side of Columbus. Four elementary schools are involved: Burroughs, Highland, West Broad and West Mound. The

census data for the years 1950, 1960 and 1970 show an area of black population between West Broad Street and Sullivant Avenue bounded on the west by Eureka Avenue and on the east by the Columbus State Institute. This area is referred to locally as the Hilltop. The western portion of this area fell mostly in the 50% to 100% black range. The eastern portion, between Belvidere and the Columbus State Institute, was in the 0 to 9.9% black range in 1950 and has become increasingly blacker in later years. The 1970 census data shows this area to have several blocks in each of the ranges of 10 to 27.9%, 28 to 59.9% and 60 to 89.9% black.

Highland Elementary has served the majority of this area between 1950 and the present. During this period the Columbus defendants established two optional attendance zones within the Highland boundaries, and also changed the attendance zone boundaries of Highland. Although the opportunity existed for the integration of the four elementary schools in this area, the option zones and boundary changes tended to preserve and promote the racial imbalance of these schools.

One optional zone appeared in 1955 and continued through the 1956-57 school year. See map 5 in the appendix. In those years, and since 1939, the Highland attendance zone included an area north of West Broad Street to the Pennsylvania Railroad tracks bounded on the west by Eldon Avenue and on the east by the Columbus State Hospital. This portion of Highland north of Broad Street was composed in each of the census years, 1950, 1960 and 1970 of blocks in the 0 to 9.9% black range, as was the entire West Broad attendance zone. For the school years 1955-56 and 1956-57 that portion of Highland north of Broad was made into an optional attendance area with students having the option of attending the predominantly white West Broad or the predominantly black Highland.

Highland was 63 students over capacity in 1955, and

67 students over capacity in 1956. West Broad, however, was also over capacity in 1955 and 1956 by 115 and 113 students, respectively. An examination of the attendance zones in the West Broad Street area reveals that several required students to cross this street to reach their school. The Court concludes that the Highland-West Broad optional zone was not created to alleviate overcrowding or because of a geographic barrier. This optional zone allowed the white students north of Board Street to escape Highland and go to West Broad. The result was to contain blacks within Highland and to maintain West Broad as a predominantly white school.

In 1957 the boundary lines for Highland and West Broad were redrawn, eliminating the option zone and placing that area permanently within the West Broad attendance zone. Because West Broad's capacity problems were greater than those of Highland, a purpose of the boundary change could not have been to alleviate the overcrowding at Highland. Since the West Broad attendance zone dipped south of Broad Street west of the Highland zone, the Court concludes that West Broad Street was not considered a geographical barrier in the decision to redraw these boundaries.

In 1964, the first year in which the racial statistics for enrollment are available, Highland had a black student enrollment of 75%. West Broad Street was 100% white in 1964. The Court finds that the optional attendance zone and boundary changes between Highland and West Broad had a foreseeable and actual effect of promoting racial imbalance.

Another optional attendance zone was created within the Highland boundaries in 1955. This optional zone was in the southeastern corner of Highland and gave the students living there the option of attending either Highland or West Mound Street. See map 5 in the appendix. This option continued through the 1960-61 school year.

The census data for 1950 shows that the West Mound Street attendance zone was, with the exception of one block, within the range of 0 to 9.9% black. The remaining block was in the 10 to 27.9% black category. In 1960 the West Mound attendance area was still largely in the 0 to 9.9% black range with four blocks in the 10 to 27.9% category and one block in the 28 to 49.9% range. The option area east of Wrexham and south of Doren was in the 0 to 9.9% black range in the 1950 census. In the 1960 census the option area continued to be predominantly white with a small portion falling in the 10 to 27.9% black range.

The effect of the Highland-West Mound option was to allow those students living in the whiter portion of the Highland attendance zone to opt out of attendance at identifiably black Highland in favor of the whiter West Mound Street School. The defendants contend that this optional zone was created to alleviate overcrowding in Highland. During the option years Highland was over capacity and West Mound Street was under capacity ranging from four students below capacity in 1957 to 105 in 1960. The effect of the option on the overcrowding at Highland was the foreseeable result that the white students within the option zone would exercise the option to attend West Mound. Thus, even though an option zone may have eased the capacity problem, this particular option zone tended to make Highland blacker and West Mound whiter. In 1961 the option was terminated and the greater part of the option area was rezoned permanently to West Mound Street.

The intervening plaintiffs have shown that feasible alternatives were available and known to the Columbus defendants. One of these alternatives was to move the option area to the west, or make the boundary changes west of where they were made. This alternative would have allowed students from the blacker part of the Highland attendance area to attend West Mound, thus having an integrative effect on West Mound while easing the

overcrowding at Highland. Another alternative would require redrawing the attendance zones in this area for Highland, West Mound, West Broad, and Burroughs. Dr. Foster testified that the total capacity of these four schools was 3,060 at the time of trial and the enrollment was 2,773. The following statistics are applicable to these schools:

	1964	1969	1974
Burroughs			
% black students	16	14.6	12.5
% black faculty	0	3.1	18.5
Highland			
% black students	75	71.7	72.7
% black faculty	4.6	22.6	16.7
West Mound			
% black students	15	16.1	16.5
% black faculty	0	7.7	17.4
West Broad			
% black students	0	0.7	1.0
% black faculty	0	3.0	12.1

The racial balance at all four schools could have been enhanced by redrawing the attendance zones for these four schools through the Hilltop area. This could also be achieved by pairing. The Court finds each of these alternatives to be feasible and there has been no showing that they are unsound as a matter of academic administration. The Court concludes that the actions of the Columbus defendants had a substantial and continuing segregative impact upon these four west side schools.

Moler Elementary Discontiguous Attendance Area

In the early and mid-1960's, the Columbus Board of Education was faced with overcrowded elementary schools in the southeastern area of the Columbus school district. Stockbridge Elementary, Alum Crest Elementary, Watkins Elementary and an addition to Stockbridge Elementary were opened in the southeastern area during this period. In the 1963-64 school year, the Board of Education assigned the eastern portion of the Watkins Elementary School attendance area to Moler Elementary School. This eastern portion of the Watkins area did not abut the Moler attendance area. See map 6 in the appendix. To arrive at Moler, students living in the discontiguous attendance area were transported through the Alum Crest attendance area. This discontiguous attendance area remained in effect through the 1975-76 school year, when this case was tried.

Census data for 1960 indicate that neither the Moler attendance area proper nor its discontiguous attendance area had a significant number of black residents. The same census showed that the Alum Crest attendance area did have a significant black population. The following statistics are applicable:

	1964	1969	1974
Alum Crest Elem.			
% black students	50	77	78.7
% black faculty	33.3	40	25
Moler Elem.			
% black students	0.2	8.7	50.1
% black faculty	0	10.5	11.8

Between September, 1966 and June, 1968, about 70 students, most of them white, were bused daily past Alum Crest Elementary from the discontiguous attendance area to Moler Elementary. The then-principal of Alum Crest watched the bus drive past the Alum Crest building on its way to and from Moler. At the time, the Columbus Board of Education was leasing 11 classrooms at Alum Crest to Franklin County. There was enough classroom space at Alum Crest to accommodate the students who were transported to Moler. When the principal inquired of a Columbus school administrator why this situation existed, he was given no reasonable explanation.

The Court can discern no other explanation than a racial one for the existence of the Moler discontiguous attendance area for the period 1963 through 1969.

The Heimandale Discontiguous Attendance Area

The Fornof Elementary attendance area is in the southern part of the Columbus school district. To the east of the Fornof area, and adjacent to it, is the Heimandale Elementary attendance area. The 1950 census shows no appreciable black population in either attendance area. The 1960 census indicates that Fornof's area remained predominantly white, with all census tracts having less than 10% black residents. The Heimandale attendance area, on the other hand, reflects a substantial black population by 1960, with most of the area between 28% and 50% black, and some tracts as high as 90-100% black. The 1970 census data for both areas are similar to the 1960 data. In 1964, the first year for which such statistics are available, Fornof had 0.2% black students, and no black faculty members. In the same year, Heimandale had 40% black students and 40% black faculty.

For six school years, from 1957-58 through 1962-63, the Columbus Board of Education perpetuated a discon-

tiguous attendance area involving Heimandale and Fornof. Students living on three streets (Wilson, Bellview and Eagle Avenues) located near the center of the Heimandale attendance area were assigned to attend Fornof instead of Heimandale. Less than 10% of the persons living on these streets were black. There was no geographical or capacity justification for the Heimandale discontiguous attendance area. The existence of this area meant that students living on Wilson, Bellview or Eagle Avenue did not attend their neighborhood school, Heimandale, which had a significant number of black students, and did attend Fornof, which was a racially identifiable white school.

The Innis-Cassady Alternatives

In 1971, the Columbus school district absorbed the Mifflin school district. The area involved is north of the City of Bexley, between 13th Avenue and Morse Road. The Mifflin school district had been in poor financial straights; schools in the district were severely overcrowded. The Columbus Board of Education initially maintained the Mifflin district boundary as a school attendance area, but was required to assign some pupils to a nearby temporary facility while more permanent arrangements were being made.

The north-south length of the area involved is greater than the east-west breadth. Cassady Elementary School, opened as a Mifflin school in 1964, is located on Agler Road roughly midway between 13th Avenue and Morse Road. The residential area south of Agler Road was and is predominantly black, while the area north of Agler Road was and is predominantly white. Because Cassady Elementary was so overcrowded, the first school built with funds raised under the 1972 bond issue was Innis Road Elementary School, which was intended to alleviate the overcrowding at Cassady. Innis was built to the north and west of Cassady; it opened in 1975.

The Columbus Board of Education had announced in 1972 that improved racial balance of student enrollment was a factor which was relevant in site selection and boundary drawing. In 1975, prior to the September opening of Innis Road Elementary, the administrative staff of the Columbus Public Schools presented to the Columbus Board of Education two alternative attendance proposals concerning Innis and Cassady. Dr. John Ellis, Superintendent of the Columbus Public Schools, explained at trial why two options, rather than a single recommendation, were presented to the Board:

> The basic reason was to see, as we attempt to wrestle with the very difficult issue of how can we insure we are doing everything that we can that is reasonable and appropriate and right to increase the approved integration within the Columbus School District. We are honestly attempting to achieve that end, and we looked at a couple of different alternatives in these cases to see whether or not we could come up with a better plan than — to see if there was a better approach, and as it turned out, both approaches had some problem with the standpoint of distances and transportation and crossing highways and preferences of people and a host of factors that go into the establishment of boundaries.

Dr. Ellis and Mr. Robert W. Carter, Executive Director of Administration, Columbus Public Schools, both testified at trial that in their respective opinions, the alternatives presented to the Board of Education concerning Innis and Cassady were both educationally sound. The administrative staff did not recommend one alternative over the other.

One alternative entailed dividing the old Mifflin district into two attendance areas, with a horizontal boundary line dividing an Innis attendance area to the north

from a Cassady attendance area to the south. The administrative staff and the Board of Education knew that adopting this alternative would mean that Cassady would draw its enrollment from the predominantly black southern portion of the old Mifflin district, while Innis would draw its enrollment from the predominantly white northern portion.

The other alternative entailed maintaining the old Mifflin district as the attendance area for both Cassady and Innis, with one school designated as a primary center (kindergarten through third grade) and the other as an intermediate school (grades four through six). The administrative staff and the Columbus Board of Education knew that adopting this alternative would mean that the black student enrollment in each school would be roughly equivalent to the white student enrollment.

The Columbus Board of Education chose the first alternative. It divided the old Mifflin district into two elementary attendance areas, one to the south for Cascady and one to the north for Innis. When Innis Road Elementary School opened for the 1975-76 school year, its student enrollment was 27.3% black. Cassady Elementary School during the same year had 89.3% black students.

During closing arguments, counsel for the Columbus Board of Education explained the Board's decision as follows:

> The Board based its decision on the fact that it at the time decided to maintain the K-6 organization throughout the district and that the pairing of these schools, given the geographical location of these two areas, would have required a substantial amount of transportation to effect a pairing situation.

The Columbus defendants' proposed findings of fact run in a similar vein:

> [T]he pairing of such schools would have required substantial transportation because of the large size of the combined areas. The Board voted not to pair the schools.
>
> . . . The alternative proposal would have required substantial transportation because of the greater distances involved. The Columbus Board was also justified in its decision to maintain the K-6 organization that now exists throughout the system with the exception of Colerain, which is a primary and crippled children center. Other primary centers are no longer in existence. Sixth Avenue has been closed. The K-3 primary center at Hudson, which was assigned to Hamilton, was recently eliminated with an addition. The school system has never had a K-3 primary center without a K-6 home school . . . .

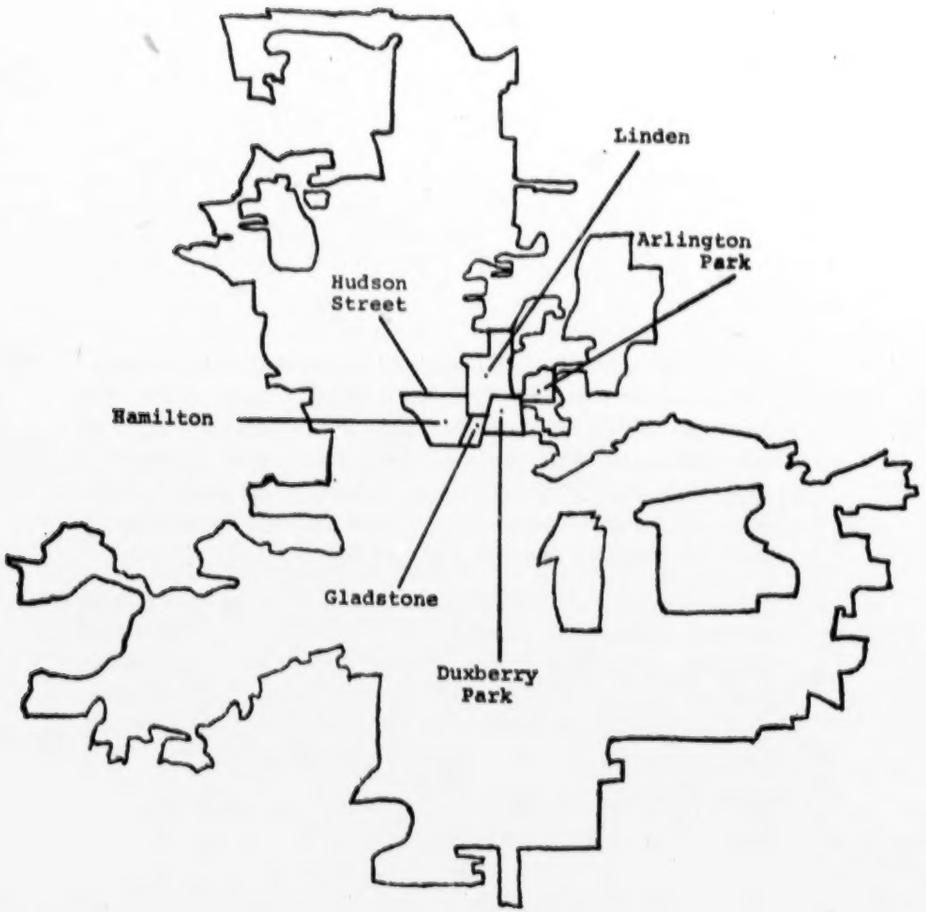
These defendants' own proposed findings amply demonstrate that when in the past a diversion from the K-6 structure served interests, such as overcrowding and special educational concerns, which were considered important by the Board, the Columbus Board of Education did not hesitate to abandon the K-6 structure in favor of primary centers and intermediate schools.

The Court can find no evidence in this record supporting defendants' argument that pairing Innis and Cassady would have necesitated "substantial transportation" of students. Dr. Ellis testified that *both* alternatives "had some problem with the standpoint of distances and transportation and crossing highways. . . ."

429 F.Supp. at 243-49.

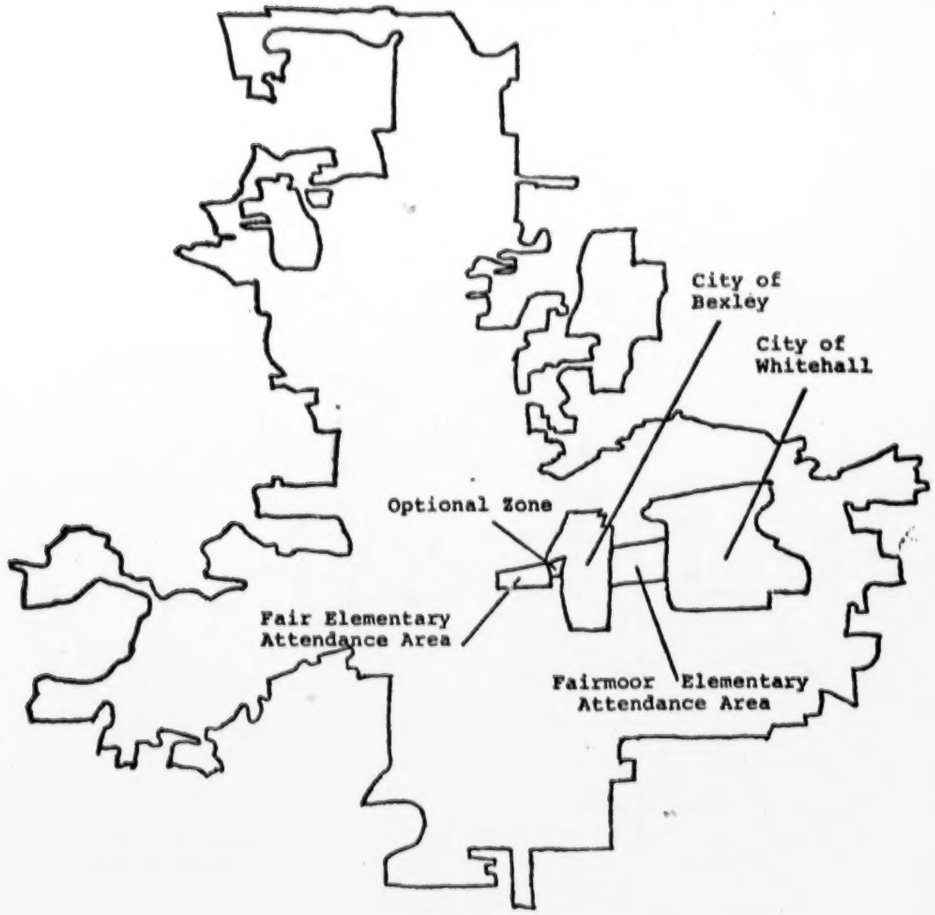
Gladstone, Duxberry Park, Linden,
Hamilton and Arlington Park
Elementary Schools

Map No. 1



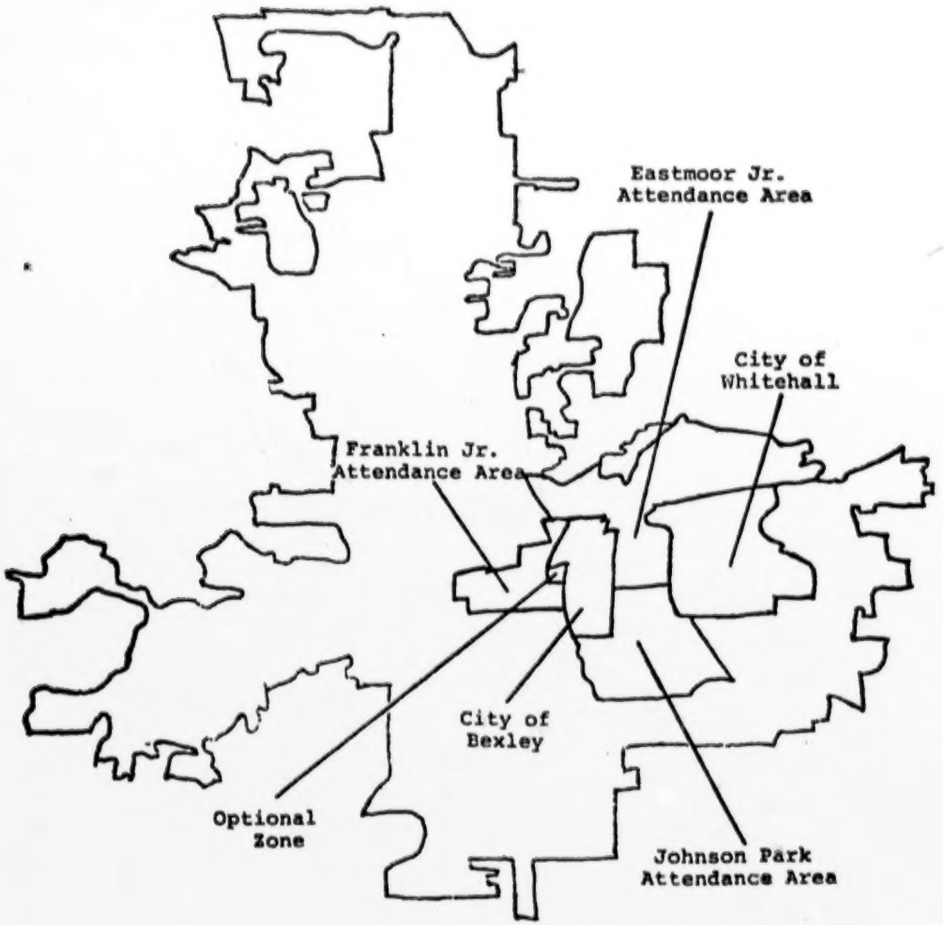
Near-Bexley Option – Elementary Schools

Map No. 2



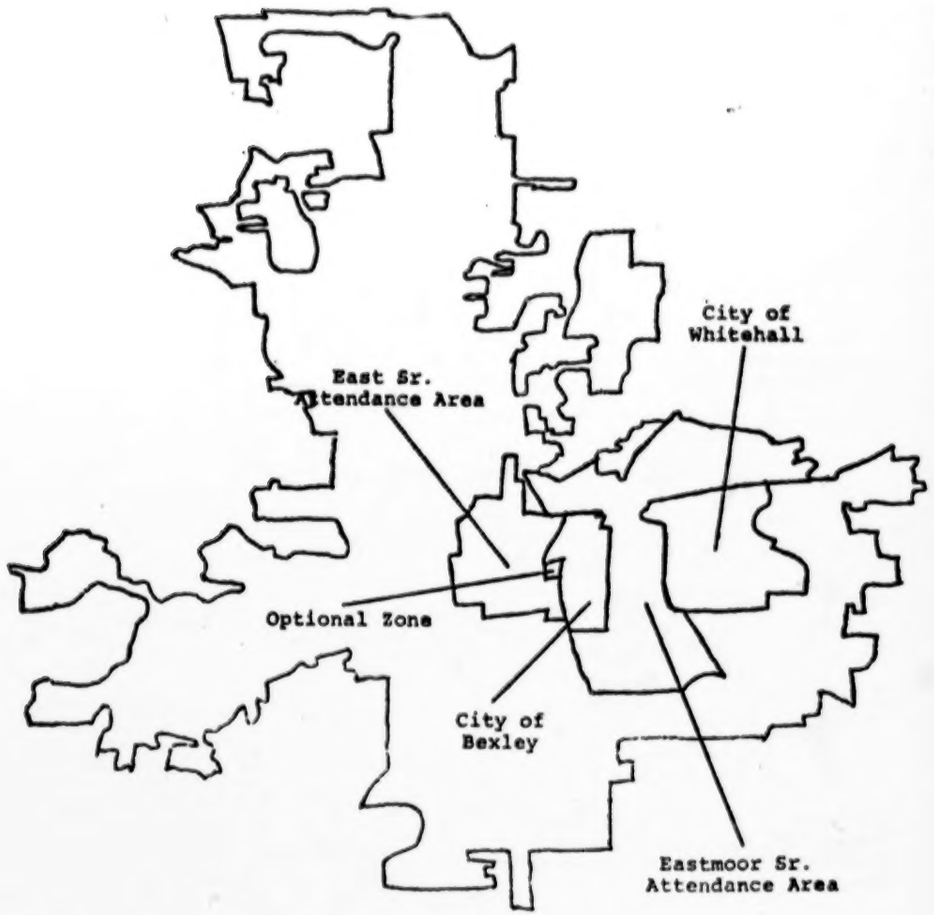
Near-Bexley Option – Junior High Schools

Map No. 3



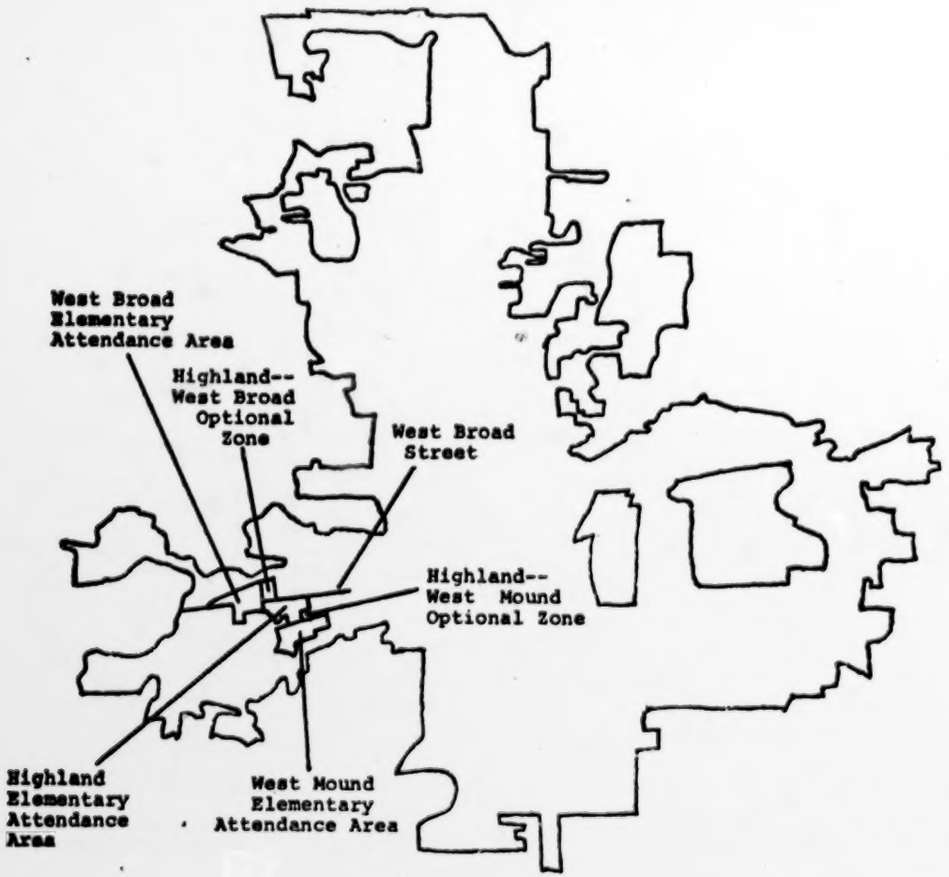
Near-Bexley Option – Senior High Schools

Map No. 4



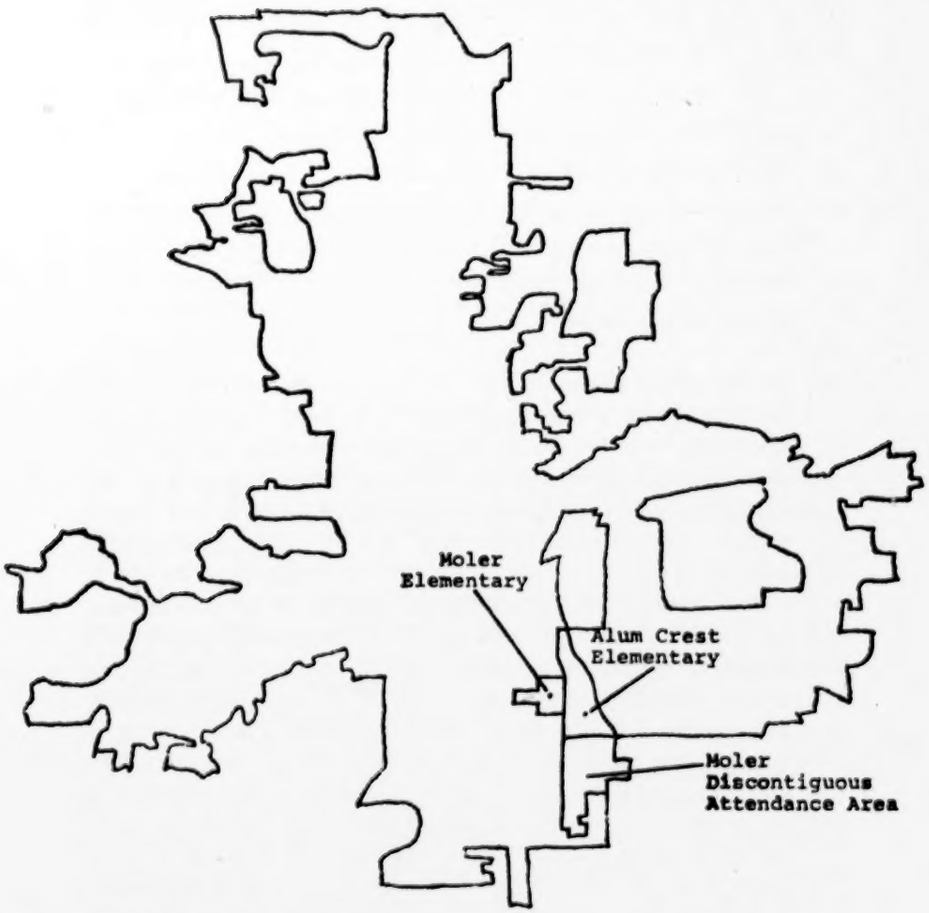
Highland, West Mound and West Broad
Elementary Optional Zones

Map No. 5



Moler Elementary Discontiguous
Attendance Area

Map No. 6



429 F.Supp. at 270-75.

VI SYSTEMWIDE SEGREGATION AND SYSTEMWIDE IMPACT

The law cited at the beginning of this opinion, as stated by the Supreme Court in *Swann, supra, Keyes, supra,* and *Dayton, supra,* calls for systemwide desegregation when (and only when) the segregative practices found had a systemwide impact. The key phrases are:

> As with any equity case, the nature of the violation determines the scope of the remedy.
>
> *Swann, supra* at 16.
>
> [P]roof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system.
>
> *Keyes, supra* at 203.

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington* v. *Davis, supra.* All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes,* 413 U.S., at 213.
>
> *Dayton, supra* at 420.

The three statements represent increasingly detailed concern that the equitable remedy should be fashioned to fit the actual Fourteenth Amendment violations which were found. The most deliberate and willful violation of the Constitution in one of over a hundred schools would therefore call for an order to take effective means to desegregate that school. The remedy might affect one or more nearby schools. The isolated single violation obviously would not call for a systemwide desegregation order.

It is clear to us that the phrases "incremental segregative effect" and "systemwide impact" employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact as to each isolated practice, or episode. Each such practice or episode inevitably adds its own "increment" to the totality of the impact of segregation. *Dayton* does not, however, require each of fifty segregative practices or episodes to be judged solely upon *its* separate impact on the system. The question posed concerns the impact of the total amount of segregation found – after each separate practice or episode has added its "increment" to the whole. It was not just the last wave which breached the dike and caused the flood.

In the *Dayton* school case, the Supreme Court held that where the District Judge had only identified "three separate although relatively isolated instances of unconstitutional action on the part of petitioners" [*id.* at 413] . . . "the District Court's findings of constitutional violations did not, under our cases, suffice to justify the remedy imposed." *Id.* at 414. The Supreme Court carefully noted that this court had observed in its opinion that the record contained more evidence concerning segregation than the District Judge had found, but that neither the District Court nor this court had entered specific findings of fact on such alleged additional segregative practices. The Supreme Court then ordered the case remanded for further consideration and, if justified,

further evidentiary proceedings and further findings of fact by the District Court or the Circuit Court. The Supreme Court also left the systemwide desegregation order in effect.

We now turn to the consideration of the incremental segregative effect of the major constitutional violations found by the District Judge. School board policies of systemwide application necessarily have systemwide impact. 1) The pre-1954 policy of creating an enclave of five schools intentionally designed for black students and known as "black" schools, as found by the District Judge, clearly had a "substantial" – indeed, a systemwide – impact. 2) The post-1954 failure of the Columbus Board to desegregate the school system in spite of many requests and demands to do so, of course, had systemwide impact. 3) So, too, did the Columbus Board's segregative school construction and siting policy as we have detailed it above. 4) So too did its student assignment policy which, as shown above, produced the large majority of racially identifiable schools as of the school year 1975-76. 5) The practice of assigning black teachers and administrators only or in large majority to black schools likewise represented a systemwide policy of segregation. This policy served until July 1974 to deprive black students of opportunities for contact with and learning from white teachers, and conversely to deprive white students of similar opportunities to meet, know and learn from black teachers. It also served as discriminatory, systemwide racial identification of schools.

As noted earlier in this opinion, we rely upon the detailed findings of the District Judge in relation to each of the constitutional violations cited in the paragraph above. As to each of these violations, we believe this record requires a finding that each policy or practice cited had (and was intended to have) a systemwide application and impact. Each such policy or practice also added an increment to the sum total of the constitutional violation found. Beyond doubt the sum total of these violations made the Columbus school system a segregated school system in violation of the Fourteenth

Amendment and thoroughly justified the District Judge in ordering a systemwide remedy. If the detailed findings in this paragraph tracking the language of the *Dayton* case cannot appropriately be implied from the District Judge's post-*Dayton* opinion (and we think they can and should be), we now enter these findings as the findings of this court, based upon the 6,600 pages of evidence in the record made before the District Court.

Appellants in this appeal seek a remand to the District Court on the basis of the Supreme Court's opinion in *Dayton, supra*. For reasons spelled out above, and the distinctions cited below, we reject this suggestion.

1) The Supreme Court in *Dayton*, on consideration of the District Court findings then entered, characterized the Dayton school system as one "where mandatory segregation by law of the races has long since ceased." The Columbus record, as found by the District Judge, presented a situation where a segregated school system existed in 1954, when *Brown I* was decided, and has been intentionally maintained as such by the Columbus School Board down to the date of trial of this case.

2) The Supreme Court in *Dayton* noted that the District Judge had found only three isolated constitutional violations. In our instant appeal, the District Judge found many more constitutional violations, with the major violations being ones which, as shown above, were systemwide in application and impact.

3) In the *Dayton* case a major reason for reversal was this court's reliance in requiring a systemwide remedy upon three violations which were not systemwide in character without making findings upon other violations contained in the record. In this case we rely specifically upon the systemwide constitutional violations found by the District Judge, and, to the degree arguably necessary, add findings of our own.

4) In the *Dayton* case, of course, neither the District Court nor this court had the opportunity to consider the standards furnished by the *Dayton* opinion. In this case the District Judge was asked to and did consider the *Dayton* standards and held that his prior opinion was in conformity therewith. We, of course, have likewise considered it in detail and agree that the systemwide violation found by the District Judge was in conformity with *Dayton* standards.[8]

VII THE STATE BOARD OF EDUCATION LIABILITY

The District Judge, in addition to finding the Columbus Board of Education liable for the unconstitutional segregation of the Columbus school system, also found similar liability as to the Ohio State Board of Education. His findings on this score were, however, quite different ones:

> *State Board of Education and*
> *Superintendent of Public Instruction*
>
> The Ohio Constitution clearly places the responsibility for public education upon the State of Ohio. Because local school boards initiate school levies for local voters' consideration, expend funds locally, and generally exercise administrative control over local schools, many people may well believe that such local boards of education have primary responsibility for the maintenance and operation of the public schools in Ohio. In fact, the state remains primarily responsible. This mandate has been our law since the adoption of the 1851 Ohio Constitution.[5]

[5] OHIO CONST. art. I, § 7; art. II, § 26; art. VI, § 2 (1851). OHIO CONST. art. VI, § 3 (1912).

[8] We have considered but, for the reasons recited above, we do not agree with appellants' contention that a different result is mandated by the remand orders of the Supreme Court in *School District of Omaha* v. *United States*, 433 U.S. 677 (1977), and *Brennan* v. *Armstrong*, 433 U.S. 672 (1977).

The Sixth Circuit has commented on the obligation of the state administrative agency as follows:

> Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools.

Brinkman v. *Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974).

At no time have these state defendants *actively* moved to do anything to correct the racial imbalance in the Columbus schools. Nor did they act to make a determination as to whether black children were being deprived of their rights. The State Board and Superintendent assure that such matters as teacher qualifications, school building standards, curriculum requirements and annexations are lawfully administered. See R.C. 3301.07. The Court is of the opinion that the law of Ohio requires that the State Board of Education act to assure that school children in the various local school districts enjoy the full range of constitutional rights. The Board has not done this in Columbus even though it has received sufficient statistical evidence of student and faculty racial imbalance and is well aware of the existence of racially imbalanced schools in Columbus.[6]

[6] Counsel for the State of Education argued as follows during closing arguments:

> I am not pleading ignorance.
>
> . . .
>
> I am saying to the Court that the State Board has constructive knowledge of everything that is reported to the State Department of Education about the racial make-up of pupils and staff in the schools of Columbus. It has constructive knowledge. It is bound by that knowledge.
>
> Now, it is not so much a matter of investigation, Your Honor. It is a question of whether or not, knowing that, the State Board and Department should have told Columbus to make certain specific changes, and if Columbus refused to change, should the State Board and Depart-

The State Board and the State Superintendent are Ohio's resident experts on school desegregation matters. They have the means to collect information, which they have done, to conduct hearings, to make findings, and to enforce orders based on their findings.[7] In 1956 the

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ment have threatened to withhold funds? Now, before they can do that, they have to have some reasonable basis to believe what they have constructive knowledge of is a violation of law.

. . .

[W]hen we look at the recommendations that have been made to Columbus [by the State Board], all of this is a panoply of activity that has desegregation as its objective. Now, the plaintiffs claim that the State Board is totally uninterested in desegregation, that it has a policy of maintaining segregation, but I say that this is absurd and does not stand up under the evidence in this record.

The final question, a quasi question, is whether the State Board and Department could have done more. Could they have gone to Columbus and could they have demanded that certain things take place? Sure. We can all do more, but that is not the decisive legal issue. The question is not whether the State Board could have done more. The question is whether the State Board of Education had a policy of maintaining segregation, because that is what the majority of the *Keyes* decision talks about. Did it have segregative intent? The assessment of that question is important to the trier of facts.

. . . [T]he explanation for the State Board's failure to demand that Columbus take certain specific acts and corrective action is not due to a policy of maintaining segregation. It is due, instead, to the State Board's belief that the Columbus Board has certain powers that are given to it by the statutes of Ohio and that the Columbus Board and its Superintendent must be allowed to exercise those powers except where the exercise is in plain violation of the law. It had reason to believe that the Columbus Board was not in violation of the law, and that is the reason that it didn't demand the things that it demanded in Middletown, the things that it demanded in Toledo, the things that it demanded in North College Hill.

The State Board and the Department do not have a policy of maintaining segregation in the State of Ohio. They could do more, but they don't have a policy of maintaining segregation in this state, and their failure to do more is not the product of a segregative or segregationist state of mind.

[7] R.C. § 3301.16 provides that the Board shall revoke the charter of any school district which fails to meet the mini-

Attorney General of Ohio advised that the State Board had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, to local districts which segregated pupils on the basis of race in violation of *Brown I*.[8] The facts of this case offer no satisfactory reason for these state officials' failure to perform their duties as advised by the Attorney General. Mere "suggestions" to the Columbus Board were not enough. These defendants cannot be heard to say that they could not understand their obligations; the Attorney General made those clear.

Dr. Kenneth Connell, representing the Columbus Area Civil Rights Council, visited the offices of the state defendants in the spring of 1971 and requested that action be taken regarding the Columbus schools. No action was taken. As I understand the state defendants' argument, they claim that they would have investigated had Columbus school officials so requested. This position borders on the preposterous. It cannot reasonably be expected that those who violate the constitution will

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mum standards. The Board may then dissolve the district and transfer its territory to one or more adjacent districts. The State of Ohio provides financial assistance through the School Foundation Program to all qualifying, chartered districts in the state. The funds are provided by the legislature and are allocated by the Department of Education among the districts in accordance with the provisions of R.C. § 3317.01 *et seq.* The Board disburses substantial federal funds to districts which qualify under different federal programs. Before a district may receive any federal funds, it must submit assurances that it is in compliance with law.

[8] The Attorney General opined:

Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds . . . .

be anxious for an investigation in order that a remedy may be leveled against them.

The sheer multitude of appellate court decisions cited by the parties arising from school segregation cases all over this country from 1954 until this case was at issue, coupled with notice of the racial imbalance in the Columbus schools, would have led even the most socially optimistic to suspect that Ohio's second largest city might have some problem in that regard which required attention.

The state defendants are to be commended on the accumulation of data, advisory resumes and personnel to be used for desegregation. Dr. Robert Greer has worked long and hard in a leadership role in finding avenues designed to lead to equal educational opportunities. Information was provided to local districts, and rather gentle persuasion employed to encourage desegregation. But some firm action is needed when the horse won't drink the water. •

The failure of these state defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise.

429 F.Supp. at 262-64.

Thus, as we view the District Judge's findings (and this record clearly supports him), they rest primarily upon the failure of the State Board to order the Columbus Board to perform its constitutional duty to operate a school system which was not segregated by race.

The crucial consideration here concerns the powers and duties of the State Board. The parties agree that in 1956, as noted by the District Judge, the Attorney General interpreted this Ohio law as giving the State Board the power to

withhold state funds from any school board which was operating an unlawfully segregated school system. The parties also appear to agree that this opinion (written by the present Chief Justice of the Ohio Supreme Court) is law which controls the State Board.[8]

The State Board does not contend that it was unfamiliar with the history and present practices of the Columbus Board in operating the school system in the state capital city.

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[8] The specific holdings of the opinion follow:

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The term "law" as used in Section 3317.14, Revised Code [presently codified at Ohio Rev. Code Ann. § 3307.01 (Page Supp. 1977)], forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119., Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

Respectfully,

C. William O'Neill
Attorney General

1956 Op. Atty. Gen. Ohio 514, 520-21.

This record does not show any act on the part of the State Board which *required* the Columbus Board to pursue the segregative policies which the District Judge and this court have found. It also does not show any action that the State Board took affirmatively to desegregate the Columbus schools or even to use its statutory powers to investigate and make findings as to whether the Columbus schools were being operated within the law.

The State Board's primary contention on this appeal is that it had no prior knowledge that the segregation existing in the Columbus schools was *unlawful* since it did not know that said segregation was derived from intentionally segregative policies on the part of the Columbus School Board. The State Board also argues that the District Judge did not make findings concerning the "incremental segregative effect" (*Dayton, supra* at 420) of its actions upon the totality of segregation in Columbus.

While we believe that what we have quoted from the District Judge's opinion must be regarded as a general finding of intentional support of segregation by the State Board, it may well be argued that the *Dayton* opinion requires more detailed findings of fact pertaining to 1) the State Board's knowledge (if any) of the Columbus Board's intentional segregative practices, 2) the State Board's failure to protest or restrain them by withholding funds, 3) the State Board's continuance of support in the face of such knowledge, 4) the motivation of the State Board in failing to investigate the reasons for de facto segregation, and 5) the effect of findings if any, under 1, 2, 3 and 4 above, as suggested in *Dayton, supra* at 420.

For these reasons and with recognition that no practical delay in ending the unconstitutional practices which we have found above will result, we now remand these cases (as they pertain to the State Board only) for further consideration,

including at the option of the District Judge, the taking of additional testimony concerning factual issues enumerated above. *See Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977); *see also Rizzo* v. *Goode*, 423 U.S. 362, 376-77 (1976); *Monell* v. *Department of Social Services*, 46 USLW 4569, 4579 n. 58 (U.S. June 6, 1978); *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir. 1978).

VIII REMEDY

The arguments of both appellants pertaining to remedy attack the systemwide remedy ordered by the District Judge solely on the ground that no systemwide constitutional violation or violations should have been found as to each appellant, and hence, no systemwide remedy should have been ordered. This argument has been dealt with at length above and has been rejected. We do not find presented to us any systemwide alternative plan for desegregation. The plan, in fact, was either devised by or approved by both appellants, although, of course, under protest as to its systemwide nature.

Under these circumstances, the plan as adopted by the District Court is approved and the judgment of the District Court is affirmed in all respects, except for the remand of the case for consideration of and findings on the impact of the constitutional violation discussed in the preceding section pertaining to the liability of the Ohio State Board of Education.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 77-3365-66
77-3490-91
77-3553

GARY L. PENICK, et al.,

Plaintiffs-Appellees,

v.

COLUMBUS BOARD OF EDUCATION, et al., and THE OHIO STATE BOARD OF EDUCATION, et al.,

Defendants-Appellants.

Before: EDWARDS, LIVELY and MERRITT, Circuit Judges.

JUDGMENT

[Filed July 14, 1978]

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in all respects except that those cases pertaining to The Ohio State Board of Education are remanded for further consideration as set forth in section VII of the opinion filed this date.

Each party to pay his own costs on these appeals.

ENTERED BY ORDER OF THE COURT.

JOHN P. HEHMAN
Clerk

77-3365, 77-3366, 77-3490
77-3491, 77-3553

Issued as Mandate: August 9, 1978 A True Copy.

Attest:

DOROTHY J. PHELAN
Deputy Clerk

COSTS: None

Filing fee ..... $ .....

Printing ..... $ .....

Total $ .....

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 77-3365-66, 3490-91 & 3553

Gary L. Penick, et al.,
Plaintiffs-Appellees,
v.

Columbus Board of Education, et al.,
and
The Ohio State Board of Education, et al.
Defendants-Appellants.

ORDER
[Filed July 31, 1978]

Before: EDWARDS, LIVELY and MERRITT, Circuit Judges.

On receipt and consideration of a motion for stay of the mandate of this court and for stay of the judgment of the United States District Court for the Northern District of Ohio; and

In the absence of a showing of likelihood of success on appeal, and recognizing that, in any event, defendant-appellant will have ample time to apply for a writ of certiorari and a stay of judgment in the United States Supreme Court before the beginning of the 1978 school term,

Now, therefore, said motion for stay of mandate and stay of the judgment of the District Court is hereby denied.

Entered by order of the Court

JOHN P. HEHMAN
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-134

Columbus Board of Education et al.,
Applicants,
v.
Gary L. Penick et al.

On Application for Stay.

[August 11, 1978]

MR. JUSTICE REHNQUIST.

The Columbus, Ohio, Board of Education and the Superintendent of the Columbus Public Schools request that I stay execution of the judgment and the mandate of the Court of Appeals for the Sixth Circuit in this case pending consideration by this Court of their petition for certiorari. The judgment at issue affirmed findings of systemwide violations of the Equal Protection Clause of the Fourteenth Amendment on the part of the Columbus Board of Education, and upheld an extensive school desegregation plan for the Columbus school system. The remedy will require reassignment of 42,000 students, alteration of the grade organization of almost every elementary school in the Columbus system, the closing of 33 schools, reassignment of teachers, staff and administrators, and the transportation of over 37,000 students. The 1978–1979 school year begins on September 7, and the applicants maintain that failure to stay immediately the judgment and mandate of the Court of Appeals will cause immeasurable and irreversible harm to the school system and the community. The respondents are individual plaintiffs and a plaintiff class consisting of all children attending Columbus public schools, together with their parents and guardians.

This stay application comes to me after extensive and complicated litigation. On March 8, 1977, the District Court for the Southern District of Ohio issued an opinion declaring the

Columbus school system unconstitutionally segregated and ordering the defendants to develop and submit proposals for a systemwide remedy. That decision predated this Court's opinions in three important school desegregation cases: *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977); *Brennan* v. *Armstrong*, 433 U. S. 672 (1977); and *School District of Omaha* v. *United States*, 433 U. S. 667 (1977). In the lead case, *Dayton*, this Court held that when fashioning a remedy for constitutional violations by a school board, the court "must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." 433 U. S., at 420. The defendants moved that the District Court reconsider its violation findings and adjust its remedial order in light of our *Dayton* opinion. Upon such reconsideration, the District Court concluded that *Dayton* simply restated the established precept that the remedy must not exceed the scope of the violation. Since it had found a systemwide violation, the District Court deemed a systemwide remedy appropriate without the specific findings mandated by *Dayton* on the impact discrete segregative acts had on the racial composition of individual schools within the system. The Sixth Circuit affirmed. *Penick* v. *Columbus Board of Education*, Nos. 77–3365–3366, 3490–3491, and 3553 (July 14, 1978).

Prior to its submission to me, this application for stay was denied by MR. JUSTICE STEWART. While I am naturally reluctant to take action in this matter different from that taken by him, this case has come to me in a special context. Four days before the application for stay was filed in this Court, the Sixth Circuit issued its opinion in the *Dayton* remand. *Brinkman* v. *Gilligan (Dayton IV)*, No. 78–3060 (July 27, 1978). Pursuant to this Court's opinion in *Dayton*, the District Court for the Southern District of Ohio had held

a new evidentiary hearing on the scope of any constitutional violations by the Dayton school board and the appropriate remedy with regard to those violations. It had concluded that *Dayton* required a finding of segregative intent with respect to each violation and a remedy drawn to correct the incremental segregative impact of each violation. On that basis the District Court had found no constitutional violations and had dismissed the complaint. The Sixth Circuit reversed, characterizing as a "misunderstanding" the District Court's reading of our *Dayton* opinion. *Dayton IV*, *supra*, slip. op., at 4. It reinstated the systemwide remedy that it had originally affirmed in *Brinkman* v. *Gilligan (Dayton III)*, 539 F. 2d 1084 (1976), vacated and remanded, 433 U. S. 406 (1977).

Dayton IV and the instant case clearly indicate to me that the Sixth Circuit has misinterpreted the mandate of this Court's *Dayton* opinion. During the Term of the Court, I would refer the application for a stay in a case as significant as this one to the full Court. But that is impossible here. The opinions of the District Court and the Court of Appeals total almost 200 pages of some complexity. It would be impracticable for me to even informally circularize my colleagues, with an opportunity for meaningful analysis, within the time necessary to act if the applicants are to be afforded any relief and the Columbus community's expectations adjusted for the coming school year.

I am of the opinion that the Sixth Circuit in this case evinced an unduly grudging application of *Dayton*. Simply the fact that three Justices of this Court might agree with me would not necessarily mean that the petition for certiorari would be granted. But this case cannot be considered without reference to the Sixth Circuit's opinion in *Dayton IV*. In both cases the Court of Appeals employed legal presumptions of intent to extrapolate systemwide violations from what was described in the Columbus case as "isolated" instances. *Penick* v. *Columbus Board of Education*, *supra*, slip op., at 36 (July 14, 1978). The Sixth Circuit is apparently of the opinion that presumptions, in combination with such isolated

violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations. That is certainly not my reading of *Dayton* and appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in *Dayton III*. In my opinion, this questionable use of legal presumptions, combined with the fact that the Dayton and Columbus cases involve transportation of over 52,000 school children, would lead four Justices of this Court to vote to grant certiorari in at least one case and hold the other in abeyance until disposition of the first.

On the basis of the District Court's findings, some relief may be justified in this case under the principles laid down in *Dayton*. Two instances where the school system set up discontiguous attendance areas that resulted in white children being transported past predominantly black schools may be clear violations warranting relief. But the failure of the District Court and the Court of Appeals to make any findings on the incremental segregative effect of these violations make it impossible for me to tailor a stay to allow the applicants a more limited form of relief.

In their response, the plaintiffs/respondents also take an "all or nothing" approach and do not offer any suggestions as to how the mandate and judgment of the Court of Appeals can be stayed only in part consistent with the applicants' legal contentions. I therefore have no recourse but to grant or deny the stay of the mandate and judgment in its entirety.

The last inquiry in gauging the appropriateness of a stay is the balance of equities. If the stay is granted the respondent-children's opportunity for a more integrated educational experience is forestalled. How many children and how integrated an educational experience are impossible to discern because of the failure of the courts below to inquire how the complexion of the school system was affected by specific violations.

In contrast, the impact of the failure to grant a stay on the applicants is quite concrete. Extensive preparations toward

implementation of the desegregation plan have taken place, but an affidavit filed in this Court by the Superintendent of the Columbus Public Schools indicates that major activities remain for the four weeks before the new school term begins. These activities include inventory, packing, and moving of furniture, textbooks, equipment and supplies; completion of pupil reassignments, bus routes and schedules, and staff and administrative reassignments; construction of bus storage and maintenance facilities; hiring and training of new bus drivers; and notification to parents of pupil reassignments and bus information. Such activities cannot be easily reversed. Most important, on September 7 there will occur the personal dislocations that accompany the actual reassignment of 42,000 students, 37,000 of which will be transported by bus.

The Columbus school system has severe financial difficulties. It is estimated that for calendar year 1978 the system will have a cash deficit of $9.5 million, $7.3 million of which is calculated to be desegregation expenses. Under Ohio law school districts are not permitted to operate when cash balances fall to zero and it is now projected that the Columbus school system will be forced to close in mid-November of 1978. Financial exigency is not an excuse for failure to comply with a court order, but it is a relevant consideration in balancing the equities of a temporary stay.

Given the severe burdens that the school desegregation order will place on the Columbus school system and the Columbus community in general, and the likelihood that four Justices of this Court will vote to grant certiorari in this case, I have decided to grant the stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit.

As this Court noted in *Dayton*, "local autonomy of school districts is a vital national tradition." 433 U. S., at 410. School desegregation orders are among the most sensitive encroachments on that tradition, not only because they affect the assignment of pupils and teachers, but also because they often restructure the system of education. In this case the desegregation order requires alteration of the grade organiza-

tion of virtually every elementary school in Columbus. As this Court emphasized in *Dayton*, judicial imposition on this established province of the community is only proper in the face of factual proof of constitutional violations and then only to the extent necessary to remedy the effect of those violations.

It is therefore ordered that the application for a stay of the judgments and mandates of the Court of Appeals for the Sixth Circuit and the District Court for the Southern District of Ohio be granted pending consideration of a timely petition for certiorari. The stay is to remain in effect until disposition of the petition for certiorari. If the petition is granted, the stay shall remain in effect until further order of this Court.

Supreme Court of the United States

No. A-134

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et.al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners and the responses filed thereto,

IT IS ORDERED that the mandates and the execution of enforcement of the judgments of the United States Court of Appeals for the Sixth Circuit in case Nos. 77-3365-66, 77-3490-91 and 77-3553 and the United States District Court for the Southern District of Ohio in case No C-2-73-248 are hereby stayed pending the timely filing of a petition for a writ of certiorari. If such a petition is timely filed, this stay is to remain in effect pending this Court's action on the petition. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court.

/s/ WILLIAM H. REHNQUIST
Associate Justice of the Supreme
Court of the United States

Dated this 11th day of August, 1978

Supreme Court of the United States

No. A-134, October Term, 1978

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et.al.

ORDER

On August 21, 1978, a motion to convene the Court for a Special Term to vacate the stay order heretofore entered by Mr. Justice William H. Rehnquist on August 11, 1978, in the above-entitled cause was received and filed with the Clerk's Office, and was distributed to the Court at my direction.

A majority of the Justices having responded and no affirmative votes having been received to convene a Special Term of the Court, the motion is denied.

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 25th day of August, 1978.

No. 78-3060

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARK BRINKMAN, et al.,
Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed July 27, 1978.

Before: PHILLIPS, Chief Judge, LIVELY, Circuit Judge, and PECK, Senior Circuit Judge.

PHILLIPS, Chief Judge.

For the fourth time this court is called upon to review the protracted proceedings of this action brought by plaintiffs[1] to obtain relief from alleged unconstitutional segregation of the Dayton public schools resulting from actions by defendants.[2] Reference is made to the previous decisions of this

[1] Parents of children attending schools operated by the defendant Board of Education (hereinafter Board) filed this action on April 17, 1972 alleging that defendants were responsible for operating a racially segregated school system in violation of the fourteenth amendment and Federal civil rights statutes, 42 U.S.C. §§ 1981, 1983-88, 2000d.

[2] Defendants included the Dayton Board of Education, its superintendent and individual members, and the governor, attorney general, State Board of Education, and superintendent of public instruction of the State of Ohio. Appellants have not sought any relief against the State defendants on the present appeal. "Defendants," as used in this opinion, refers to the local defendants.

court for a detailed recitation of facts and issues. *See Brinkman* v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (*Brinkman* III), *vacated and remanded sub nom., Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *Brinkman* v. *Gilligan*, 518 F.2d 853 (6th Cir. 1975) (*Brinkman II*); *Brinkman* v. *Gilligan*, 503 F.2d 684 (6th Cir. 1974) (*Brinkman I*).

In its initial opinion filed February 7, 1973, the district court found that racially imbalanced schools, optional attendance zones, and the rescission by the Dayton Board of Education (hereinafter Board) of three resolutions calling for racial and economic balance in each public school were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In *Brinkman I, supra*, 503 F.2d 684, this court affirmed the holding of the district court that the Dayton public schools were unlawfully segregated by race and also reviewed four school practices[3] which allegedly maintained and expanded the segregated school system. This court determined that at that time it was unnecessary to consider whether these four practices should be included as part of the constitutional violation in view of the conclusion that the remedy ordered by the district court was inadequate "considering the scope of the cumulative violations." *Id.* at 704.

Following remand, this court again rejected the desegregation plan adopted by the district court on the grounds that the plan failed to eliminate the "basic pattern of one-race schools" and the "continuing effects of past segregation" throughout the Dayton school system. *Brinkman II, supra*, 518 F.2d at 857. We again remanded the case to the district court with the following instructions:

> On remand we direct that the court adopt a systemwide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976. *Id.* at 857.

[3] These practices are in the areas of faculty and staff assignment; school closing and site selection; grade structure and reorganization; and pupil transfers and transportation. The district court did not include any of these practices within its finding of a cumulative constitutional violation.

After evidentiary hearings and the appointment of a master, the district court ordered the implementation of a systemwide desegregation plan for the 1976-77 school year subject to flexible guidelines.[4]

In *Brinkman III, supra*, 539 F.2d 1084, this court approved the systemwide plan which thus became operative for the 1976-77 school year. Subsequently, the Supreme Court vacated the judgment[5] of this court and ordered that the case be remanded to the district court for further proceedings. *Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. 406 (1977). The Supreme Court directed that the district court:

[4] The plan required that the racial distribution of each school be brought within 15 percent of the black-white population ratio of Dayton which was 48 percent black and 52 percent white. In its order of December 29, 1975 the district court stated:

> In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.
>
> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school.
>
> 3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

JA-I at 55. [Citations to the record are to the joint appendix (JA) and the volume of the appendix (*e.g.*, -I) unless otherwise noted].

[5] The Supreme Court, however, directed that the plan approved by this court in *Brinkman III* should remain in effect for the 1977-78 school year "subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion."

> first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff.
>
> • • •
>
> If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. (citations omitted). 433 U.S. at 420.

On remand, the district court conducted evidentiary hearings November 1-4, 1977, and in its decision issued December 15, 1977, held that:

> [T]here is a burden upon plaintiffs to establish by a preponderance of evidence *both* a *segregative intent and an incremental segregative effect in order to establish a violation* of the Equal Protection Clause of the Fourteenth Amendment. (emphasis added) JA-I at 104.

Pursuant to this misunderstanding[6] of the Supreme Court's mandate, the district court individually examined each alleged constitutional violation both for segregative intent and incremental segregative effect. The district court concluded that plaintiffs had failed to meet this burden of proving a constitutional violation and dismissed the complaint. Following the filing of this appeal, this court on January 16, 1978 ordered defendants "to cause said system-wide desegregation plan to remain in effect pending appeal, or until further order of this court."

[6] *See* note 36, *infra*, and accompanying text.

Appellants and the United States as amicus curiae (hereinafter collectively referred to as appellants) contend that various findings of fact and conclusions of law of the district court are both clearly erroneous and are based upon incorrect legal standards. They urge this court to address the legal and factual issues previously reserved in *Brinkman I*, *supra*, 503 F. 2d 684 and to find that the alleged constitutional violations have a systemwide impact which requires reinstatement of the systemwide remedy approved by this court in *Brinkman III*, *supra*, 539 F.2d 1084. Appellants raise four principal assignment of error. First, they contend that the district court misinterpreted the legal relevance of the Board's conduct prior to the time of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and that the district court's finding that "[a]t no time . . . did defendant maintain a dual system of education"[7] was either based upon the application of incorrect legal standards or was a clearly erroneous factual finding. Appellants argue that as a result of these errors, the district court ignored the principle that if the Board was operating a dual school system at the time of *Brown I*, or at any time thereafter, it subsequently had an affirmative duty to eliminate the systemwide effects of its prior acts of segregation. Second, appellants argue that the district court erred in applying improper legal standards for determining segregative intent. They assert that the district court both failed to utilize the established burden-shifting principles in determining whether various practices were the product of segregative intent and disregarded the established legal standards for determining segregative intent. Third, appellants contend that the district court erred in failing to apply the presumption and burden-shifting principles concerning causation and the impact of unconstitutional conduct. Finally, appellants assert that the district court misallocated the burden of proof on the issue of the incremental segregative effect of the alleged constitu-

[7] Order of March 10, 1975, JA-I at 38.

tional violations. They argue that the district court erred in holding that plaintiffs were required to demonstrate both the existence of racial discrimination and the specific effects of that discrimination.

Upon a review of the entire record, the arguments of counsel, and upon consideration of the legal and factual issues previously reserved by this court in *Brinkman I, supra,* 503 F.2d 684, we conclude that the systemwide desegregation plan approved by this court in *Brinkman III, supra,* 539 F.2d 1084, should be reinstated. The record demonstrates conclusively that at the time of *Brown I,* defendants intentionally operated a dual school system and that subsequently, defendants never fulfilled their affirmative duty to eliminate the systemwide effects of their prior acts of segregation. To the extent that any findings of fact and conclusions of law of the district court are to the contrary, they are either clearly erroneous, Rule 52 FED. R. CIV. P., or are incorrect as a matter of law.

I. Pre-Brown violations

This court previously reviewed defendants' purported intentional segregative acts alleged to have occurred prior to 1954 and concluded that "the Dayton school system has been and is guilty of de jure segregation practices"[8] which constituted a "basically dual system,"[9] at the time of *Brown I.* Although we believe this finding to have been implicit in the previous decisions of this court, we now expressly hold that at the time of *Brown I,* defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment. Our holding is based upon substantial evidence, much of which is undisputed. The finding of the district court to the contrary[10] is clearly erroneous,

[8] *Brinkman II, supra,* 518 F.2d at 854.

[9] *Brinkman I, supra,* 503 F.2d at 697.

[10] *See* note 7, *supra* and accompanying text.

Rule 52, FED. R. CIV. P., and is based upon both a failure to attribute the proper legal significance to the evidence of pre-*Brown I* violations and upon various errors of law.

Our review of the record reveals that as of the 1951-52 school year – the last period prior to *Brown I* for which racial statistics were compiled – the Dayton school board pursued an overt policy of faculty segregation and, through a variety of measures, endeavored to segregate pupils on a racial basis. Defendants admitted that prior to 1951 the board forbade the assignment of black teachers to white or mixed classrooms "pursuant to an explicit segregation policy."[11] The district

[11] *Brinkman I, supra,* 503 F.2d at 697. Defendants admitted that:

> 9. Not until 1951 did the Board of Education adopt a policy of assigning any black citizen to teach in white or mixed classrooms.

See Answers to Plaintiffs' Request for Admissions filed by defendants Dayton Board of Education, Josephine Groff, James D. Hart and William E. Goodwin (hereinafter Board admissions), admission 9, JA-I at 128; Answers to Plaintiffs' Requests for Admissions filed by defendants Dr. Wayne M. Carle, Superintendent of Schools, and Jane Sterzer (hereinafter Carle admissions), admission 9, JA-I at 135. *See generally* Plaintiffs' Exhibits (hereinafter PX) 100 A-E, JA-V at 502-06; PX 29, JA-V at 484-85.

In 1951-52, the Board substituted the following new but equally unacceptable policy:

> The school administration will make every effort to introduce some white teachers in schools in negro areas that are now staffed by negroes, but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.
>
> PX 21, JA-V at 481.

Cf. Cooper v. *Aaron,* 358 U.S. 1 (1958) (community attitudes no justification for segregation).

Superintendent Carle admitted that:

> 11. About 1951 the Board announced a policy, again for the first time, of introducing white teachers in schools having Negro population; on November 30, 1954, only 8 full or part-time white teachers, or 0.6% of the 1409 white teachers were in these situations. Defendant French at that time as Superintendent attributed such lack of success to the reluctance of white teachers to teach in the black schools; moreover, it was then the District's policy and so remained until the late 1960s, not to assign or reassign white teachers to black schools against their will. Even into the late 1960's white teachers often were

court found that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative."[12] A review of the record establishes to our satisfaction that the assignment of faculty was purposefully segregative;[13] but contrary to the finding of the district court, we found in *Brinkman I, supra*, 503 F.2d at 697-98 that the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year." To the extent that the finding of the district court is contrary to the conclusion of this court, it is clearly erroneous.

The undisputed evidence reflects that during the 1951-52 school year, the faculty at the four 100 percent black schools (Garfield, Dunbar, Willard, and Wogamon) was 100 percent black whereas with one exception,[14] the faculty at all other schools in the system was 100 percent white.[15] Defendants further admitted that as of 1954, 91.4 percent of the 162 non-travelling black teachers were assigned to schools with all black student populations.[16] Thus, at the time of *Brown I*, it was possible to identify a "black school" in the Dayton system without reference to the racial composition of pupils.

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not hired or refused employment or were assigned to predominately white schools in the District because of the availability of teacher openings in the suburban, all white schools, the personal beliefs and behavior of white applicants, and the policies and practices of the District.

Carle admission 11, JA-I at 135. The Board also admitted the above statement in substantial part. *See* Board admission 11, JA-I at 128-29.

[12] Opinion of December 15, 1977, JA-I at 73.

[13] *See, e.g.*, testimony of Dr. Wayne Carle, quoted in *Brinkman I, supra*, 503 F.2d at 699.

[14] The sole exception apparent from the record was one black teacher who was assigned during the 1951-52 school year to teach black students at a school with a 67.6 percent black enrollment — the highest black enrollment less than 100 percent. *See* PX 3, JA-I at 139; PX 100E, JA-V at 506; PX 130B, JA-V at 507.

[15] *See* PX 100E, JA-V at 506; PX 130B, JA-V at 507.

[16] *See* Board admission 10, JA-I at 128; Carle admission 10, JA-I at 135.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), the Supreme Court stated:

> Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.[17]

The district court, however, failed to attribute the proper legal significance to the deliberate policy of faculty segregation adopted and applied by defendants.

The purposeful segregation of faculty by race was inextricably tied to racially motivated student assignment practices. The record reflects that in the 1951-52 school year, 77.6 percent of all students attended schools in which one race accounted for 90 percent or more of the students and 54.3 percent of the black students were assigned to the four schools that were 100 percent black.[18] We recognize that racial imbalance in student attendance patterns is not in itself a constitutional violation. *See Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. at 413, 417 (1977); *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 (1973). However, such racial imbalance does assume increased significance in the historical context of repeated intentional segregative acts by the school board directed at the four schools which were 100 percent black in 1954. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). Defendants contend that such evidence of pre-*Brown I* constitutional violations is irrelevant, or, alternatively,

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[17] *See United States* v. *Board of School Commissioners of Indianapolis, Indiana*, 474 F.2d 81, 87 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

[18] *See* PX 2B, JA-V at 312; *Brinkman I, supra*, 503 F.2d at 694.

that the effects of any past intentional segregative actions have become attenuated in the ensuing years. These contentions are wholly without merit. First, with respect to evidence of pre-*Brown I* constitutional violations, the Supreme Court noted in *Keyes, supra,* 413 U.S. at 210-11 that:

> We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'

Second, with respect to the question of attenuation, defendants have failed to meet their burden of proving that the effects of any past intentional actions have become attenuated. *Keyes, supra,* 413 U.S. at 211.

Garfield school was the site of intra-school racial segregation which began in 1912 and was ruled illegal by the Supreme Court of Ohio in *Board of Education of School District of City of Dayton* v. *State ex rel. Reese,* 114 Ohio St. 188, 151 N.E. 39 (1926).[19] Defendant Wayne Carle, Superintendent of the Dayton schools, admitted, however, that racial segregation continued virtually unabated at Garfield after the *Reese* decision,[20] and that during the 1930s, white students who lived in the Garfield attendance area were permitted to transfer to predominantly white schools.[21] As a result of the

[19] Defendants admitted that:

> 1. In 1918 defendant Dayton Board assigned 4 black teachers to a frame two-story house which was converted to a school building for black students and which was located immediately behind the Garfield school, a brick building. All white children and all white teachers were assigned to the brick building; only black teachers and black students were assigned to the frame structure.

See Board admission 1, JA-I at 125; Carle admission 1, JA-I at 134.

[20] *See* Carle admission 2(b), (c), JA-I at 134.

[21] *See* Carle admission 2(d), JA-I at 134.

actions of the Board, Garfield became all black in student enrollment in 1936 and, at approximately the same time, an all black faculty was assigned to the school.[22] Thereafter, Garfield was maintained as an all black school.

The district court found that Dunbar high school intentionally had been established as a district-wide school for only black students with an all black faculty and a black principal.[23] The record reveals that black students throughout Dayton automatically were assigned or otherwise were induced to attend Dunbar and that, in many instances, black students crossed attendance boundaries to do so.[24] Defendants further admitted that until approximately 1947, Dunbar was not allowed to participate in the city athletic conference and consequently, Dunbar athletic teams played other all black high schools from other cities.[25] Defendants also admitted that until several months after the decision in *Brown I,* black children were transported by bus from an orphanage past white schools to Dunbar.[26] The district court found that this practice was "arguably . . . a purposeful segregative act."[27] To the extent that this finding implies that this practice was *not* purposefully segregative, it is clearly erroneous.

[22] *See* PX 150I, JA-V at 524; JA-II 260-61, 329-31.

[23] Opinion of February 7, 1973, JA-I at 3; Opinion of December 15, 1977, JA-I at 88. *See* Board admission 7(a), JA-I at 127; Carle admission 7(a), JA-I at 135.

[24] *See* JA-II, 268, 478-79; JA-III, 547-49, 632-33.

[25] *See* Board admission 7(f), JA-I at 128; Carle admission 7(f), JA-I at 135.

[26] *See* Carle admission 7(d), JA-I at 125; Board admissions 7(d) 31A, JA-I at 127, 131. The Board has adopted conflicting positions with respect to the termination of this practice. In admission 7(d), *supra,* the Board states that "this policy terminated as of 1950." In admission 31A, however, the Board states that "this practice stopped in 1954." Other evidence in the record establishes without question that this practice was not discontinued until September 1954. *See* PX 28, JA-V at 483.

[27] Opinion of December 15, 1977, JA-I at 78.

Defendants assert that since attendance at Dunbar was voluntary, there is no justification for finding that the establishment and operation of the school constituted intentionally segregative acts. This argument misses the point entirely. First, until at least as late as 1952, the option of attending Dunbar was available only to blacks since, pursuant to school board policy, whites could not be taught by Dunbar's all black faculty. Second, the record reflects that many black children were automatically assigned or otherwise encouraged to attend Dunbar regardless of choice.[28] Finally, the record indicates that the "choice" of attending Dunbar, in many instances, may have been merely a less drastic alternative than attending other schools which practiced intra-school segregation and discrimination.[29]

In this manner and through these procedures, the Board intentionally operated Dunbar as an all black school until it was closed as a high school in 1962. The operation of Dunbar clearly had the effect of keeping other high schools throughout the district predominantly white during those years.[30]

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[28] *See* JA-II at 479; JA-III at 547-49.

[29] *See* JA-II at 253, 284; testimony of Dr. Wayne Carle, Joint Appendix vol. 4, at 1518a-19a filed in *Brinkman I, supra*. The relevant colloquy between counsel and Dr. Carle is as follows:

> Q. Dr. Carle, I think you perhaps misunderstood my question. I am talking about Dunbar in its earliest stage. There was testimony from black witnesses that they 'chose Dunbar,' and I asked you in the context of the pupil assignment practices whether or not such a choice is a free choice as if in the case of Roosevelt students were subject to discriminatory practices [sic].
>
> A. I wouldn't rate it as a free choice since social pressures are so persuasive and subtle and young people so impressionable and peer influence so all-encompassing. That choice would be almost absent as I would understand it.

[30] The Supreme Court in *Keyes v. School District No. 1, supra*, 413 U.S. at 201, (1972) stated that:

> A practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white.

See JA-III at 634.

The record reflects that during the early 1940s, the student body of Wogamon elementary school became predominantly black in part because the Board permitted white students to transfer to predominantly white schools.[31] In June 1945, Wogamon closed with an all white staff and reopened in September 1945 with an all black staff and a black principal.[32] Wogamon subsequently became and presently is an all black school. Similarly, the record reflects that in the 1930s the Willard school became predominantly black due to increased black enrollment and the transfer of white students. The record indicates that in 1934, Willard school had a 50 percent black student body and a faculty which was 38 percent black. The following year, however, the student body became approximately 95 percent black with an all black faculty.[33] By 1947, Willard was 100 percent black in student enrollment and subsequently it has remained a one race school.

Additional evidence also establishes that prior to 1954, the Board pursued a policy of racial separation. Defendants admit that until approximately 1950, "separate facilities, including separate swimming pools and locker room facilities were maintained at Roosevelt [school] for black and white students."[34] In addition, during the late 1940s and early 1950s, defendants operated one race classrooms in officially one race housing projects which the district court found were "strictly segregated according to race."[35]

Upon a review of this evidence, the relevant inquiry is whether at the time of *Brown I*, or any time thereafter, defendants were operating a dual school system in violation of

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[31] *See* Carle admission 4(a), JA-I at 134.

[32] *See* PX 150I, JA-V at 524.

[33] *Id.*

[34] *See* Board admission 7A(a), JA-I at 128; Carle admission 7A(a), JA-I at 135.

[35] Opinion of December 15, 1977, JA-I at 67. *See* PX 143B, JA-V at 510-12; PX 161B, JA-V at 540; JA-I at 194-206.

the Equal Protection Clause of the fourteenth amendment. In *Keyes* v. *School District No. 1, supra,* 413 U.S. 189, the Supreme Court held that in order to establish a violation of the fourteenth amendment in school desegregation cases where no statutory dual system has ever existed, plaintiffs must demonstrate purposeful state imposed segregation in a substantial portion of the school system.[36]

In *Brinkman II, supra,* 518 F.2d at 854, this court held that defendants had been guilty of *de jure* segregative practices. There is ample evidence to support the finding that at the time of *Brown I* defendants were carrying out "a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities."[37] As noted previously, at the time of *Brown I*, approximately 54.3 percent of the black pupils in the Dayton school system were assigned to four schools that had all black faculties and student bodies. In *Keyes, supra,* 413 U.S. 189, the finding that the Denver school board was guilty of intentional segregative acts with respect to schools attended by only 37.69 percent of Denver's black students was sufficient to constitute the entire school district a dual system. The finding of the district court that defendants never had operated a dual school system[38] is clearly erroneous and is based upon misconceptions of the applicable law.

The district court erred both in failing to accord the proper legal significance to the facts extant at the time of *Brown I* and in failing to apply the appropriate presumption and burden-shifting principles of law. The district court failed to attribute the proper legal significance to the deliberate

[36] Contrary to this clear standard, the district court held that plaintiffs must establish both segregative intent and incremental segregative effect in order to establish a constitutional violation. *See* note 6, *supra,* and accompanying text.

[37] *Keyes* v. *School District No. 1, supra,* 413 U.S. at 201.

[38] *See* note 7, *supra,* and accompanying text.

policy of faculty segregation which, at the time of *Brown I,* made it possible to identify a "black school" in the Dayton system without reference to the racial composition of pupils.[39] The district court also failed to attribute the proper legal significance to the evidence that at the time of *Brown I,* Garfield, Willard, Wogamon and Dunbar schools were deliberately segregated or racially imbalanced due to the actions of defendants. These facts were sufficient to constitute a prima facie violation of the fourteenth amendment under the rule of *Swann, supra,* 402 U.S. at 18[40] and to shift the burden of proof to defendants. The district court also misconstrued the proper approach for determining discriminatory purpose and intent which may be inferred from objective circumstantial evidence[41] and through the use of reasonable presumptions.[42] This court stated in *Oliver* v. *Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975) that:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies. (citations omitted).

[39] *See* notes 16-17, *supra,* and accompanying text.

[40] *See* note 17, *supra,* and accompanying text.

[41] *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-68 (1977); *Washington* v. *Davis,* 426 U.S. 229, 241-42, 253 (1976).

[42] *See Keyes* v. *School District No. 1,* 413 U.S. at 201-13; *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1046-47 (6th Cir.), *cert. denied* 434 U.S. 997 (1977); *Oliver* v. *Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

Accord, Arthur v. *Nyquist*, 573 F.2d 134 (2d Cir. 1978); *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1047-48 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *Bronson* v. *Board of Education*, 525 F.2d 344 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Hart* v. *Community School Board of Education*, 512 F.2d 37 (2d Cir. 1975). The evidence clearly establishes that the natural, probable and foreseeable result of defendants' actions was the creation and perpetuation of a dual school system. The district court, moreover, failed to recognize the teaching of *Keyes, supra*, 413 U.S. at 208, that:

> [A] finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system.

The district court erred in failing to shift the burden of proof to defendants.

A review of the entire record indicates that defendants have not established that the character of the school system extant in 1954 was the result of racially neutral acts. We emphasize that defendants' intentional segregative practices cannot be

confined in one distinct area.[43] To the contrary, defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system. There is no doubt that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra*, 413 U.S. at 203, and that the effect of the operation of this dual school system was to maintain other schools in the district as predominantly white.[44]

II. Post-Brown violations

The district court's error in failing to find that defendants were operating a dual school system at the time of *Brown I* resulted also in its failure to evaluate properly the Board's post-*Brown I* actions, which must be judged by their efficacy in eliminating the continuing effects of past discrimination. In *Brinkman I, supra*, 503 F.2d at 704, this court stated:

> Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities 'automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.' *Keyes, supra*, 413 U.S. at 200, 93 S.Ct. at 2693.

Thus, for 24 years defendants have been under a constitutional duty to desegregate the Dayton public schools. *See Penick* v. *Columbus Board of Education*, —— F.2d ——, Nos.

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[43] The Dayton school system is not divided into "separate, identifiable and unrelated units." *Keyes* v. *School District No. 1*, 413 U.S. at 203 (1972). Compare *Keyes*, in which defendants were found guilty of following a deliberate segregation policy at schools attended by 37.69 percent of Denver's black student population with the instant case in which defendants' purposeful segregative acts affected at least 54.3 percent of Dayton's black student population.

[44] *See* note 30, *supra*.

77-3365-66, 3490-91, 3553 (6th Cir July 14, 1978) slip opinion at 21. The district court specifically found that "with one exception . . . no attempt was made to alter the racial characteristics of any of the schools" and that the one exception "was in fact a failure."[45] The district court, however, neither charged defendants with the affirmative duty to eliminate the effects of their discrimination nor did it place upon the Board the burden of proving that it had done so. The evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination and have intentionally maintained a segregated school system down to the time the complaint was filed in the present case. In addition, the record discloses post-1954 actions which actually have exacerbated the racial separation existing at the time of *Brown I*.

A. Faculty and student assignment practices

In *Brinkman I, supra*, 503 F.2d at 697-98, this court found that defendants "effectively continued in practice the racial assignment of faculty through the 1970-71 school year."[46] This finding is supported by substantial evidence on the record.[47] The finding of the district court to the contrary[48] is clearly erroneous. Rule 52, FED. R. CIV. P. The district court also erred in failing to attribute the correct legal significance to the persistently discriminatory faculty assignment practices as a component of the Board's perpetuation of the dual system extant at the time of *Brown I*. Moreover, the district court

[45] Opinion of December 15, 1977, JA-I at 70, 76.

[46] For a detailed discussion of the Board's post-*Brown I* faculty assignment practices, see *Brinkman I, supra*, 503 F.2d at 697-700.

[47] *See, e.g.*, JA-II 418; JA-III 644-45; PX 4, JA-V 316-17; PX 5A, JA-V 319; PX 5D, JA-V 320; PX 130C, JA-V 508; PX 130D, JA-V 509; board admissions 8, 12-18, JA-I 128-29; Carle admissions 8, 12-18, JA-I 135.

[48] Opinion of December 15, 1977, JA-I at 73.

again failed to recognize this proof of continuing purposeful segregative acts as an element of plaintiffs' prima facie case.[49] The effect of having established this prima facie case should have been to shift to the Board the burden of rebutting the presumption that other practices likewise were undertaken with segregative intent.

For example, in 1962 the Willard and Garfield schools, previously operated for blacks only, were closed and the all black Dunbar high school building was converted into McFarlane elementary school. Most of the children from the Willard and Garfield attendance areas simply were assigned to the McFarlane school which opened with an all black student body and an all black faculty. Some children from the Willard and Garfield areas also were assigned to the all black Miami Chapel and Irving elementary schools. Simultaneously, the new Dunbar high school opened with a virtually all black student body and faculty. Defendants should have been required to rebut the reasonable presumption that the simultaneous assignment of both a predominantly black faculty and student body at these schools was the product of segregative intent and an effort to perpetuate the dual school system extant at the time of *Brown I*.

This error was compounded by imposing upon plaintiffs the additional burden of proving specific causal relationships between the widespread faculty segregation practices and the substantial student segregation existing at the time of trial.

Nowhere in the record do defendants convincingly demonstrate that the systemwide student racial imbalance characteristic of the Dayton public school system since at least the time of *Brown I* likewise was not the product of segregative acts. *Keyes, supra*, 413 U.S. at 210. "[I]t is not enough . . .

[49] *See* note 17, *supra*, and accompanying text. Even at the time this action was instituted, it was possible to identify a "black school" in the Dayton school system without reference to the racial composition of the students.

that school authorities rely upon some allegedly logical, racially netural explanation." *Id.* Defendants here have failed "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Id.* The Court in *Keyes* noted further that:

> [I]f respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.
>
> *Id.* at 211.

Defendants have failed to establish that their prior segregative acts did not create or contribute to the current segregated condition of the Dayton schools.

In *Brinkman I, supra,* 503 F.2d at 694-95, this court stated that:

> Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951-52, of 47 schools, 38 had student enrollments 90 per cent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. 'Virtual one race schools' refers to schools with student enrollments 90 per cent or more one race. In 1963-64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.
>
> In 1971-72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils 42.7 per cent were black; and 75.9 per cent of all black students were assigned to the 21 black schools. In 1972-73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).
>
> *Every* school which was 90 per cent or more black in 1951-52 *or* 1963-64 *or* 1971-72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972-73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971-72, 1963-64 and 1951-52.

Nowhere in the record have defendants demonstrated that the present systemwide racial imbalance would have occurred even in the absence of their segregative acts. As the Supreme Court noted in *Swann, supra,* 402 U.S. at 26, there is a presumption against schools that are "substantially disproportionate in their racial composition" in school systems with a history of segregation, as in Dayton.[50]

The conclusion that the maintenance of persistent racial imbalance in the Dayton schools was not merely adventitious is bolstered by defendants' use of optional attendance zones for racially discriminatory purposes in clear violation of the Equal Protection Clause.[51] In 1973, the district court determined that some optional attendance zones had been created intentionally for racially segregative purposes and that the zones had demonstrable racial effects.[52] These findings of fact

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[50] In *Keyes, supra,* 413 U.S. at 211, the Supreme Court explicated the reasons supporting this presumption as follows:

> [A] connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

[51] *See Brinkman I, supra,* 503 F.2d at 695-96.

[52] Opinion of February 7, 1973, JA-I at 5-6.

were affirmed by this court in *Brinkman I*, *supra*, 503 F.2d at 696, and are supported by substantial evidence. Nevertheless, following remand from the Supreme Court, the district court repudiated these findings, concluding that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation"[53] and that the zones had no segregative effect.[54] In reaching these clearly erroneous findings of fact, the district court once again failed to recognize the optional zones as a perpetuation, rather than an elimination, of the existing dual system; failed to afford plaintiffs the burden-shifting benefits of their prima facie case; and failed to evaluate the evidence in light of tests for segregative intent enunciated by the Supreme Court, this court and other circuits in decisions cited in this opinion.

B. School construction and site selection

The evidence of record establishes that of 24 new schools constructed between 1950 and the time this action was instituted, 22 opened 90 percent or more black or white.[55] During the same period, 78 of the 86 additions of classroom space for which racial compositions are known were made to schools 90 percent or more one race.[56] Coupled with these practices were some instances of the coordinate racial assignment of professional staffs to these schools and additions on the basis of the racial composition of the pupils served by the schools.[57] This court noted in *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1056 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977) that "[s]chool contruction which promotes

[53] Opinion of December 15, 1977, JA-I at 75.

[54] *See generally* JA-I at 81-91.

[55] *See* PX 4, JA-V 316-317; JA-III 562-63.

[56] JA-III at 649-50.

[57] *See* PX 4, JA-V 316-17; JA-III 644, 794-96; JA-IV 927-28.

racial imbalance or isolation is an important indicium of a *de jure* segregated school system." *See Oliver* v. *Michigan State Board of Education*, *supra*, 508 F.2d at 184. *See generally United States* v. *School District of Omaha*, 521 F.2d 530, 543-46 (8th Cir. 1975), *cert. denied*, 423 U.S. 946 (1976). In the face of this, the district court failed to infer purposeful segregation from this pattern of school construction which unmistakeably increased or maintained racial isolation.[58] Again the district court failed to recognize that plaintiffs had established a prima facie constitutional violation which shifted the burden of proof to defendants. Instead, the district court concluded that plaintiffs had failed to show that defendants' site selection and construction practices "had a segregative purpose or . . . had an incremental segregative effect upon pupils, teachers, or staff."[59] These findings of fact are infected by legal error and are clearly erroneous. As detailed previously, the post-*Brown I* practices of racially motivated faculty assignments to new schools bespeaks a concomitant segregative intent in the location of new schools and additions. Nowhere in the record have defendants established that their school construction and site selection practices and the simultaneous racially motivated assignment of teachers were the product of racially neutral policies. Defendants have failed "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Keyes supra*, 413 U.S. at 210.

The district court's conclusion that defendants' school construction and site selection practices had no segregative effect

[58] We note that:

> While it is true that a court may *infer* such an intent from the circumstances there is no authority for the proposition that such an intent *must* be inferred in all cases where segregated patterns exist in fact. The inference is permissible, not mandatory. (emphasis in original).

Higgins v. *Board of Education*, 508 F.2d 779, 793 (6th Cir. 1974).

[59] JA-I at 97.

likewise is clearly erroneous. Instead of meeting their affirmative duty to disestablish the dual school system extant at the time of *Brown I* and to diffuse black and white students throughout the Dayton school system, defendants pursued a policy of containment through school construction and site selection practices. As noted previous, at the time of the initial hearings in this case, approximately 80 percent of all classrooms in the Dayton school system were virtually one race. On the basis of the evidence of record, the conclusion is inescapable that defendants' school construction and site selection practices were segregative in effect.

C. Grade structure and reorganization

Appellants' principal objection in this area is to the establishment in the 1971-72 school year of a middle school system which allegedly had a segregative effect. In a report issued in 1971, the Ohio Department of Education characterized the middle school system as the apparent addition of

> one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur.
>
> PX 12, JA-V at 454.

The report further opined that:

> Of the five sets of schools currently involved in the process of conversion to feeder and middle schools, the following seems to be occurring:
>
> 1. two sets of schools will be totally black;
> 2. racial isolation will actually be increased in one set of schools; and
> 3. only in the Dayton View area, which was previously integrated, could conversion to middle schools possibly result in reduction of racial and economic isolation and insulation.
>
> *Id.*

Unrebutted testimony concluded that the effect of the middle school system was to increase or maintain segregation rather than to eradicate it in accordance with defendants' affirmative duty to disestablish the dual system.[60] The district court found that the middle schools had both "a segregative effect and an integrative effect."[61] Nevertheless, the district court concluded that plaintiffs had failed to establish segregative intent in the establishment of the middle schools. This finding is questionable in light of plaintiffs' convincing demonstration that the natural, probable, and foreseeable result of the establishment of the middle schools was an increase or perpetuation of segregation. The district court failed to recognize the middle school system as one of the areas in which defendants failed to disestablish Dayton's dual school system.

Upon consideration of the record, the conclusion is inescapable that, rather than eradicate the systemwide effects of the dual system extant at the time of *Brown I*, defendants' racially motivated policies with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization perpetuated or increased public school segregation in Dayton. Thus, defendants have utterly failed to comply with their ongoing 24 year obligation to desegregate the Dayton public schools, *Penick* v. *Columbus Board of Education*, *supra*, slip opinion at 21, and, in addition, have committed affirmative acts that have exacerbated the existing racial segregation. The remedy directed in this opinion is made neces-

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[60] *See* JA-III at 646.

[61] Opinion of December 15, 1977, JA-I at 77.

sary by: (1) the failure of defendants to disestablish the pre-1954 segregated school system; and (2) post-1954 acts of systemwide impact which have contributed affirmatively to the continuation of a segregated system.

III. Remedy

In *Dayton Board of Education* v. *Brinkman, supra,* 433 U.S. at 420, the Supreme Court stated that upon finding a constitutional violation:

> [T]he District Court in the first instance, subject to review by the Court of Appeals, must determine how much *incremental segregative effect,* these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes,* 413 U.S. at 213.
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> (emphasis added).

Contrary to the conclusion of the district court,[62] we are convinced that the term "incremental segregative effect" used by the Supreme Court in the *Brinkman* decision, was not intended to change the standards for fashioning remedies in school desegregation cases. *Penick* v. *Columbus Board of Education, supra,* slip opinion at 12, 58; *NAACP* v. *Lansing Board of Education,* — F.2d —, (No. 76-2005 6th Cir., Feb. 8, 1978), *cert. denied,* — U.S. —, 46 U.S.L.W. 3787, (June 27, 1978). The purpose of the remedy is to eliminate the lingering effects of intentional constitutional violations and to restore plaintiffs to substantially the position they would have occupied in the absence of these violations. The word "incremental"

[62] *See* JA-IV at 909; opinion of December 15, 1977, JA-I at 103.

merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is "incremental" in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution.

The district court committed two errors in its approach to this inquiry. First, it individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence. In *Keyes, supra,* 413 U.S. at 200, the Court stated:

> We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) (*Brown I*), the State automatically assumes 'an affirmative duty to effectuate a transition to a racially nondiscriminatory school system,' *Brown* v. *Board of Education,* 349 U. S. 294, 301 (1955) (*Brown II*), see also *Green* v. *County School Board,* 391 U. S. 430, 437-438 (1968), that is, to eliminate from the public schools within their school system 'all vestiges of state-imposed segregation.' *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15 (1971).

The district court's act by act approach is no more valid than the school by school approach rejected in *Keyes.* As this court noted in *Penick, supra,* slip opinion at 58:

> *Dayton* does not . . . require each of fifty segregative practices or episodes to be judged solely upon *its* sepa-

> rate impact on the system. The question posed concerns the total amount of segregation found – after each separate practice or episode had added its 'increment' to the whole. It was not just the last wave which breached the dike and caused the flood.

Secondly, the district court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination. Where plaintiffs prove, as here, a systemwide pattern of intentionally segregative actions by defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations. *See Keyes, supra,* 413 U.S. at 211 n. 17. Nowhere in the record have defendants rebutted this presumption. Since the district court failed to apply the proper legal standards, we independently consider the incremental segregative effect of defendants' most egregious practices. In so doing, we are mindful that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra,* 413 U.S. at 203. First, the dual school system extant at the time of *Brown I* embraced "a systemwide program of segregation affecting a substantial portion of the schools, teachers, and facilities"[63] of the Dayton schools, and, thus, clearly had systemwide impact. *See Penick* v. *Columbus Board of Education, supra,* slip opinion at 59-60. Secondly, the post-1954 failure of defendants to desegregate the school system in contravention of their affirmative constitutional duty obviously had systemwide impact. *Id.* at 60-61. The impact of defendants' practices with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization clearly was systemwide in that the actions perpetuated and increased public school segregation in Dayton.

[63] *See* note 37, *supra*, and accompanying text.

We hold further that each of defendants' policies and practices detailed in this opinion added an increment to the sum total of the constitutional violations.

Finding that the constitutional violations before the court have a systemwide impact, *Brinkman, supra,* 433 U.S. at 420, we conclude that the systemwide desegregation plan approved by this court in *Brinkman III, supra,* 539 F.2d 1084, should be reinstated. This remedy is "tailored to undo the violations of plaintiffs' constitutional rights . . ." and is "designed to redress" the effect of the violations found. *NAACP* v. *Lansing Board of Education,* — F.2d – –, *supra,* (No. 76-2005, 6th Cir. Feb. 8, 1978), *cert. denied,* — U.S. —, 46 U.S.L.W. 3787 (June 27, 1978). The decision of the district court is reversed. It is ordered that the desegregation plan approved by this court in *Brinkman III, supra,* 539 F.2d 1084, be and hereby is reinstated and shall remain in effect during the 1978-79 school year. Plaintiffs-appellants shall recover the costs of this appeal from the Dayton Board of Education. The case is remanded to the district court for further proceedings not inconsistent with this opinion.